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ABSTRACT

This statement of the enforcement of child day care licensing standards identifies basic concepts of the enforcement process and operational procedures necessary to bring about this process. Two types of enforcement operations, negative and positive enforcement of standards, are identified and examined in detail. Positive enforcement is defined as a program of regulatory investigation-inspection (supervision) designed to provide a support service to licensees so there is continuance of conformity to standards after licensure. A discussion of negative enforcement focuses briefly on denial of application (refusal by a regulatory agency to give an applicant permission to operate) and non renewal (denial of a reapplication for a license). Discussed in greater detail is revocation, the official termination of previously granted approval to operate in an otherwise legislatively closed area of activity. Finally, the structural aspects of enforcement are treated with respect to administrative organization of licensing operations, personnel administration aspects of enforcement, and the role of the federal government in enforcement of state licensing standards. Four appendices supplement the text by presenting materials related to licensing enforcement: statutory basis, administrative procedure act, relationships between the licensing agency and the attorney general's office, and the suppression of illegal operations. (CH)

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A Conceptual Statement

on

The Enforcement of Child Day Care Licensing Standards:

With Special Reference to Revocation

by

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December, 1976

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Letter of Transmittal

To: William Prosser
Office of the Secretary
Department of Health, Education and Welfare

December 31, 1976

Attached is a copy of A Conceptual Statement on the Enforcement of Child Day Care Licensing Standards: With Special Reference to Revocation. It is our understanding that this paper was commissioned by the Office of the Secretary of the Department of Health, Education and Welfare in relation to its evaluation of the "appropriateness" of the Federal Inter-agency Day Care Requirements (FIDCR), as mandated by Congress. However, this Statement, it should be noted, is collateral to the evaluation, per se. Conceptual clarity of state child day care licensing is seen as an essential component in policy planning for any FIDCR-like program.

The Statement is composed of two parts: 1) text, and 2) appendices. The text endeavors to do two things: 1) identify basic concepts of the enforcement process, and 2) make operational comment in respect to effectuation of the several phases of the process. The appendix material supplements the text by presenting administrative concretions relative to licensing enforcement: statutory basis, administrative procedure act, relationships between the licensing agency and the attorney general's office, and suppression of illegal operations.

Due to time limitations and the complexity of subject matter, the suppression of illegal operations, i.e. operating without a license, was generally not dealt with in the text. The reason for this exclusion was that suppression of illegal operations tends to move the licensing enforcement responsibility away from regulatory administration (and public administrative law) to the field of "straight" law enforcement (and the criminal law).

In a sense, the text focuses upon enforcement where the person at some point has submitted to the jurisdiction of the licensing law. It should be further noted that in no way should the Statement be regarded as a "petite" treatise of the law of child day care licensing enforcement or a "mini" manual section on enforcement. (One hopes it may in some instances stimulate the development of and contribute to the preparation of such a manual section.)

At this point mention should be made to two limitations of coverage in this Statement: 1) There is only slight reference to the relationship of child care licensing and child protective services as coordinative but operationally discrete community child welfare programs, 2) The openness or closedness of the child care licensing record is not dealt with except to make speculative comment as to the {temporal} confidentiality of investigation of complaints about licensees. This lack of elaborate comment derives from the present "state of operation". Observation of and dialogue with regulatory personnel indicates much operational uncertainty and confusion in respect to these two problems. The authors of this Statement recommend that the Office of Child Development conduct research in these two areas at an early date. This irresolution would seem to contribute to staff demoralization.

The controlling aim in the preparation of the Statement was simply this: as a teaching and learning document it would bring increased conceptual understanding to the enforcement of child day care licensing standards as a regulatory phenomenon. Having this increased conceptual awareness should enable child day care regulatory administrators, policy makers, and persons interested in policy making to see with greater realism the nature, potentialities, and limitations of licensing as a particular

form of safeguarding child day care. This knowledge should, in turn, be helpful in policy decision making as to whether or not other forms of safeguarding, at either the Federal or State level, are needed for child day care in America.

In the preparation and the writing of this text, we had the legal assistance of Rudolf H. Michaels and Walter Wadlington. Mr. Michaels is presently Administrative Law Judge, California Office of Administrative Hearings, and was formerly chief legal counsel for the California Social Welfare Department which had extensive child care licensing responsibilities. Mr. Michaels has contributed an introductory note to the Model State Procedure Act, in Appendix IV. Mr. Wadlington, who is James Madison Professor at the University of Virginia Law School, served as a member of the task force that drafted the Office of Child Development's Model State Day Care Licensing Act. He has also contributed the appendix statement: "Some Enumerative Comments on the Enforcement Provisions of the OCD Model Act." (Appendix I)

Other persons have contributed to this Statement: Margaret Miller, Director, Division of Licensing, Virginia Welfare Department, and John Rupp, Assistant Attorney General, Office of the Attorney General of the Commonwealth of Virginia, have contributed an appendix statement on "The Relationship of the Virginia Child Day Care Licensing Agency and the Attorney General's Office." (Appendix II) Georgiana O. Miranda, Chief, Human Service Division, Office of the Attorney General of Vermont joined with Rolland Gerhart, Jr., Director of the Vermont Office of Child Development, and a co-author of this Statement, in the preparation of an appendix statement on "The Suppression of Illegal Child Day Care Operations in Vermont."

(Appendix III) Ethel Selvester, California attorney and social work educator, provided a valuable legal search service. Miss Selvester recently served as expert to the Cyprus government for a re-examination of their child welfare law.

Respectfully submitted,

Norris E. Class

Rolland C. Gerhart, Jr.

December 31, 1976

TEXT

The Enforcement of Child Day Care Licensing Standards:
With Special Reference to Revocation

It is good that men live
by their contracts.

John Locke

I. Introduction: Child Day Care as a New Social Institution.

1. Child day care represents a change in America in the upbringing
2. of children, especially young children under six years of age. It
3. represents a major shift from almost complete reliance on the child's
4. biological parents for performing nearly all the essential tasks of
5. child rearing to a system of multiple parenting. Generally speaking,
6. prior to World War II (1940), the child's parents assumed almost com-
7. plete responsibility for: 1) nurturing the child, which included
8. feeding, sheltering, dressing, physically safeguarding, and supervising
9. daily activity; 2) being concerned with the child's physical,
10. psychological and social development in order to assure optimal self-
11. realization of inherent potentialities; and 3) legally safeguarding and
12. protecting the child in respect to rights and entitlements. In this
13. new system of child caring, many persons, most of whom are unrelated
14. to and previously unacquainted with the child, participate in the
15. upbringing process. The change is so recent that the effects are as
16. yet undetermined. Moreover, care practice and operation have simply
17. developed without reference to valid theory or sound policy formula-
18. tion. It is with one key aspect of social policy formulation and
19. implementation that this Statement is concerned: enforcement of child
20. day care licensing standards.

21. For the purpose of this Statement, child day care is operationally
22. defined as a community service which provides supplementary parent care.
23. The central feature of the service is that someone other than the child's

1. own parent assumes the care, supervision, and guidance of a child or
2. children unaccompanied by parent, guardian, or custodian, on a regular
3. basis for periods of less than 24 hours per day. The locale of the
4. service may be away from the child's home or in it during the absence
5. of the parent. Depending on the location of the service and the num-
6. ber of children cared for, child day care is generally divided into
7. either family day care or group day care. Family day care takes place
8. ~~in the care-giver's home~~ for a small number of children. Group day
9. care is usually provided in non-home settings, although there is some
10. group (family) day care in which the number of children is larger than
11. in family day care generally, but the care takes place in a home setting.
12. The facility for sizeable group care not in a home setting very fre-
13. quently is referred to as a child day care "center." When the child
14. is cared for in his or her own home by an unrelated person on a
15. regular basis for part of the day and a parent is not present, it is
16. generally referred to as in-home day care. It is a form of supple-
17. mentary parent care and should be regarded as a form of child day
18. care. However, the classification of in-home care by a non-related
19. person as a form of day care is relatively recent and is still a
20. matter of debate and confusion. As a result of searching the literature,
21. the in-home care seems to attract greater community attention, as such,
22. when the care-giver is paid out of public funds.

23. Historically, the social causation which might account for the
24. emergence of child day care as a social institution in the second half
25. of the twentieth century in America includes the following:

1. 1) The extended family system has declined almost to the point of
2. disappearance.
3. 2) The neighborhood as a mutual aid system has attenuated due to a
4. high-level of population mobility.
5. 3) The cultural acceptance of divorce has tended to decrease the
6. permanency of marriage and the stability of the home.
7. 4) The community acceptance of working mothers, propelled in part
8. by welfare policy and reenforced, perhaps, by the women's liber-
9. ation movement, necessitates an ever-increasing amount of day
10. care service.
11. In light of the nature of these social factors there is no reason
12. to believe that in the immediate future there will be any lessening of
13. the need for child day care as a basic community service in the American
14. society. Thus the need for sound regulatory policy planning and
15. implementation, including the enforcement of licensing standards, will
16. continue to increase.

II. The Safeguarding of Child Day Care as a Regulatory Challenge.

1. In a sense, child day care licensing specifically came late to
2. child care licensing generally. Before the turn of the twentieth
3. century the licensing and regulation of twenty-four hour foster child
4. care began to develop. Institutions, twenty-four hour family homes
5. and child placing agencies were brought under the jurisdiction of new
6. ~~child care licensing statutes.~~ After the 1909 White House Conference
7. on Child Welfare which focused on the care of dependent children away
8. from their own homes (and measures to prevent unnecessary removal),
9. child care licensing programs proliferated greatly. By 1920, almost
10. all states had some type of child care licensing although there were
11. great variations as to what was regulated. However, in relation to
12. the concern of this paper it should be emphatically noted that the
13. licensing of child day care was generally not specifically enumerated
14. as a responsibility in child care licensing statutes. The accultura-
15. tion of child day care as a social institution which might be subject
16. to widespread regulatory administration was still twenty to thirty
17. years away. Only after 1940, and a second World War causing women,
18. including mothers, to work away from the home in great numbers, would
19. child day care be recognized as a new social institution in need of
20. serious consideration in respect to policy formulation both as to
21. program and regulation.

22. Unfortunately, a wartime and post-wartime era was not the most
23. opportune time for public policy consideration of child day care: an

1. enemy must be defeated, and then the all but overwhelming aftermath
2. of social problems be dealt with. The net result was that with little
3. or no public discussion the policy decision was made to "jam" child
4. day care safeguarding into the existing mold of twenty-four hour child
5. care regulatory administration. This was done regardless of "opera-
6. tional fit" or appropriateness. In retrospect, this policy decision
7. to tie the administration of child day care licensing to twenty-four
8. hour child care licensing without recognizing and providing for
9. fundamental differences between the two categories of care was most
10. unfortunate, especially in relation to the standards enforcement
11. aspect of child day care.

12. At least two reasons make it unfortunate to combine child day
13. care with twenty-four hour child care licensing. The first reason is
14. that the functional nature of twenty-four-hour (foster) care is quite
15. different from day care and therefore the regulatory administrative
16. goals will be different. In twenty-four hour foster care, there is
17. a child protective function which theoretically as well as empirically
18. is not present in day care. Twenty-four hour foster care is truly
19. substitute parental care. Both the licensing authority and the place-
20. ment agency, if present, must take on a protective role. This protec-
21. tive role plus, in some instances, a sort of social advocate function,
22. does not tend to develop in day care operations - at least not in the
23. same way. Generally speaking, the parent or responsible adult using
24. day care not only sees the child before and after care each day, but
25. has daily contact with the service and is in a position to make certain

1. observations and to confront the operator and staff regarding possible
2. inappropriate care - if recognized. Moreover, the day care operator
3. is clearly more economically related to the parent in day care operations
4. than in twenty-four hour foster care. This is especially so when the
5. child has been placed by an agency which makes the payments. In fact,
6. there is reason to believe that most or a large majority of adult
7. users perceive the function of day care to be fundamentally different
8. from twenty-four hour care. Instead of seeing it as substitute parental
9. care, it is regarded only as a supplementary and/or complementary care
10. service, that is, as an extension of the parent's own care and respon-
11. sibility. Obviously, these functional differences between the day
12. care and foster care services raise many questions in respect to
13. regulatory structure and operation. One of the most pressing is this:
14. Does the same rationale for state intervention to safeguard child care
15. hold for both programs or should there be a separate statutory (policy)
16. basis for each program, including legislative directions for enforce-
17. ment? Observation suggests that the users of day care may see the
18. functional merits of day care licensing very much more constrictive.
19. This was brought out in a feedback research study carried out by
20. several graduate students at the School of Social Work of the Univer-
21. sity of Southern California. Forty middle-class mothers of various
22. ethnic backgrounds were interviewed to learn how they perceived the
23. function of day care licensing. All the mothers knew something about
24. licensing and all felt positive about its general safeguarding function,
25. especially as to life-safety aspects and its "checking on the character
26. of the operator and staff." But in many instances, this is also where

1. the perception ended as to the licensing function. To such questions
2. as "Should the licensing worker 'check' on the day care program?" or
3. "What should the licensing authority do, if anything, as to the social-
4. ization aspect of the child in day care", the reply of the overwhelming
5. majority was to the effect that this was not a function of the licensing
6. agency. With much statistical frequency, a rejoinder was added such
7. as "This is not necessary, don't I see the child and the facility every
8. day myself?" (Parenthetically, it might be speculated that some
9. mothers who saw no need for the regulatory agency to function in this
10. latter area were "compensating for guilt" because of working and their
11. responses represented their way of reassuring themselves that they were
12. still assuming full responsibility for their child's development.) In
13. so far as these attitudinal differences toward the function of licensing
14. prevail, there would seem to be a feasibility in the separability of
15. the licensing statutes as well as in the form of standards and perhaps
16. in the administrative location of the licensing responsibility.

17. A second reason why it may have been unfortunate to combine child
18. day care licensing with existing twenty-four hour foster child care
19. licensing is that the latter licensure operation was usually located
20. administratively in state public welfare departments.* This factor of
21. administrative location has special significance for the enforcement
22. of child day care licensing standards. Two things need to be noted
23. regarding the public welfare department's "connections" with child day

* See page 5, OCD's Day Care Licensing Standards: Summary Report on Phase I. "The licensing authority in most states (84%) is the Department of Welfare or its equivalent". The latter, equivalent, would include agencies such as Social Service Departments.

1. care licensing generally, and with enforcement specifically. One,
2. the popular image of "public welfare", right/ or wrongly, is that
3. it is concerned with relief and extremely serious problems of depen-
4. dency and rehabilitation. In short, that it is oriented to "social
5. pathology." Child day care as viewed by the man on the street, simply
6. does not "fit" into this picture of administrative responsibility.
7. Rather, properly so or not, an image of education and (normal) child
8. development service has been projected on to day care. With much
9. frequency, when persons who are about to start a day care operation
10. learn that they will need a license they are surprised -- and often
11. distressed -- that the regulatory authority is in the welfare depart-
12. ment. One of the reported motivations of an association of providers
13. of child day care who successfully challenged the state day care
14. licensing law in the courts was that having to post a license from
15. the welfare department "stigmatized" the operation. The net result of
16. this welfare image is simply this: Administratively locating child
17. day care licensing programs in welfare departments does not contribute
18. to the generation of regulatory leadership, and it may even detract
19. from such a goal. Certainly the average state department of public
20. welfare would not be immediately viewed as having the prestige or
21. staff expertise upon which to predicate a vigorous program for the
22. enforcement of child day care licensing standards.

23. Another possible limitation of having child day care licensing
24. (as well as twenty-four hour care licensing) in the welfare department
25. is that the administrative magnitude of public assistance and relief

1. programs tends to deprive day care regulation of top management atten-
2. tion and leadership. It is not that the top management personnel
3. are inherently indifferent or insensitive to the needs of day care
4. children. Rather, it is simply a matter of the administrative time,
5. energy, and pressure which economic assistance programs demand, that
6. is, a matter of priorities. Furthermore, with relief expenditures
7. and costs currently such emotionally charged issues, it is quite
8. conceivable that top public welfare administrators might be reluctant
9. to undertake a vigorous program of licensing standards enforcement
10. if it involved stepping on the toes of members of the community whose
11. support or good will were needed to get the general welfare budget
12. through the legislature.

13. The implication of this discussion regarding the administrative
14. location of child day care in the state department of public welfare
15. is that this locale may not augur well for the development of vigorous
16. programs of licensing standards enforcement. An important policy
17. question is immediately at hand: Is it possible and pragmatic to
18. revise and internally restructure existing state public welfare
19. departments to achieve a positive child day care regulatory adminis-
20. tration, or would it be operationally better to relocate child day
21. care licensing responsibilities elsewhere? It goes without saying
22. that to raise questions and make negative evaluations about the present
23. administrative locations of child day care licensing in the state
24. department of public welfare does not in itself provide the answers
25. as to the proper relocation.

1. Before arriving at a definitive conclusion as to the best adminis-
2. trative location of public child day care services (including regulatory
3. programs) in any given state, a number of factors -- historic, economic,
4. and coordinative -- must be considered. Certainly in any decision
5. making as to where best to administratively locate day care responsi-
6. bilities special attention should be given to the feasibility of
7. of establishing a separate and independent state "Office of Child
8. Development." Such an Office of Child Development would, of course,
9. be multifunctioned: carrying among other responsibilities those of
10. implementing community organization programs for child development,
11. possibly the operation of child development community clinics or
12. parents' consultation service, and possibly the licensing and accredi-
13. tation of child development personnel. Thus, the assignment of day
14. care service licensing in this office would be appropriate -- a
15. "natural." Also, such an Office of Child Development would play an
16. important role in approving or certifying day care services in
17. relation to "purchase of service" by public agencies using state or
18. federal funds, like fiscal regulatory administration. After a formative
19. period in which basic organization and operational aspects unique to
20. child development services were worked through, the integration of
21. this office into a larger administrative structure might then be
22. considered.

III. Enforcement of Child Day Care Licensing Standards:

An Operational Definition.

1. A delineation of the phrase "enforcement of child day care
2. licensing standards" begins with an operational definition of child
3. day care licensing standards and then moves to a classificatory analysis
4. of enforcement activity.

5. A. Licensing Standards

6. Licensing standards may be operationally defined as the various
7. requirements which must be met before official approval to operate is
8. granted and which after approval must be continually met lest there be
9. a formal termination of the permission to operate. Applied to child
10. day care, licensing standards or requirements represent community
11. expectations of performance where a person engages in one of the
12. several forms of caring for a child in the absence of the parent for
13. part of the day, either away from the home or in the home. Function-
14. ally, by setting standards the State endeavors to legitimate only
15. certain patterns of child day care. These legally accepted forms of
16. day care are to safeguard the physical, mental, and social well-being
17. of the child. Operationally, the goal of all standard formulation in
18. this field, whether it relates to physical, mental, or social well-
19. being, is to minimize the risk to the child.

20. Child day care licensing standards are of a various and sundry
21. nature. Naturally they vary greatly in respect to which type or
22. category of care is being regulated. Observation indicates, however,

1. that regardless of the type of care (centers or family day care), the
2. standards taken as a "set" will tend to cluster in these broad areas:
3. 1) program and staffing requirements, which include facility adminis-
4. tration and possibly parent participation; 2) health and sanitation
5. requirements, which include physical (and possibly mental) health of
6. the children, nutrition, personal health of staff or caregivers,
7. and environmental sanitation; and 3) fire and other safety requirements.

8. The type of standards formulated and the outer limits of their
9. scope should be controlled by what might be termed the statutory
10. "guidelines" for the regulatory agency in standard formulation or
11. rule making. An example of well stated guidelines for formulating
12. child day care standards can be found in Section 6b of the "Model
13. State Day Care Licensing Act" in Guides for Day Care Licensing,
14. published by the federal Office of Child Development. (Hereafter
15. Office of Child Development will be abbreviated as OCD and the Model
16. State Day Care Licensing Act will be referred to as the OCD Act.)

17. "The rules and regulations for operating and main-
taining day care facilities and day care systems
shall be designated to promote the health, safety
and welfare of the children who are to be served
by assuring safe and adequate physical surroundings
and healthful food; by assuring supervision and
care of the children by capable, qualified person-
nel of sufficient number; by assuring an adequate
program of activities and services to enhance
the development of each child; and by encouraging
parental participation.

The rules and regulations with respect to granting,
suspending, revoking, and making probationary
licenses and approvals and licensing and approval
administration shall be designed to promote the
proper and efficient processing of matters within

the cognizance of the Department and to assure applicants, licensees and approved operators fair and expeditious treatment under the law."

1. The gains of statutory guidelines for standards are at least two-fold.
2. First, they are administratively directive, resulting in the intent of
3. the legislature being conveyed to the licensing agency. Secondly,
4. knowing the clear intent of the legislature and the areas within which
5. they are authorized to act should be conducive to staff security and
6. confidence. The latter is a most important factor in positive adminis-
7. tration of licensing standards enforcement.

8. The term standards (i.e., licensing standards) needs further
9. clarification. Operationally, a licensing standard is a form of rule
10. making that is delegated to a regulatory agency by the licensing
11. statute. An agency rule, as defined in the Revised Model State
12. Administrative Procedure Act (see Appendix IV) is "each agency statement
13. of general applicability that implements, interprets, or prescribes
14. law or policy, or describes the organization, procedure or practice
15. requirements of an agency."

16. A regulatory agency, such as a state child day care licensing
17. agency, might be said to formulate three types of rules: 1) proce-
18. dural, 2) interpretative, and 3) legislative. Procedural rules
19. describe the methods by which a regulatory agency carries out its
20. function such as requiring the application to be on "prescribed"
21. forms. Interpretative rules are those statements that clarify opera-
22. tions, and may have the effect of setting jurisdictional limits such
23. as when important terms are defined, e.g. "family day care" and "centers".

1. Legislative rules go beyond interpretation: they prescribe behavior
2. or actions and carry positive or negative sanction. If you conform,
3. you are permitted to operate (positive sanction); if you do not con-
4. form, you are prohibited from operating (negative sanction); and if
5. you operate without official approval, criminal law or injunctive
6. penalties may be applied. The focus of this statement is, of course,
7. on the so-called legislative (or substantive) standards. The degree
8. of enforcement of these legislative standards determines whether or
9. not children in day care situations are safeguarded through regulatory
10. administration.

11. B. Enforcement

12. The dictionary defines enforcement as that which puts into effect
13. or maintains in effect. As used in child day care regulatory adminis-
14. trations, the operational goal of licensing standards enforcement is a
15. three-step administrative activity: 1) to refuse applicants permission
16. to operate when the regulatory investigation determines a failure to
17. conform to provisions of the statute or standard; 2) to terminate
18. (temporarily in the form of suspension or permanently in the form of
19. revocation) a previously granted approval when regulatory investigation
20. or inspection determines failure to conform to the statute or standards;
21. 3) to suppress illegal activity, mainly operating without a valid
22. license.

23. To achieve a totality of the three operational goals enumerated
24. above there needs to be a tripartite system of enforcement adminis-
25. tration. The first part would provide what might be termed positive

1. enforcement of standards. As defined in this Statement, positive
2. enforcement of standards is concerned with a continuance of compliance
3. to standards (after issuance of the license) by means of regulatory
4. inspection. The second part might be appropriately referred to as
5. negative enforcement of standards. In negative enforcement of stan-
6. dards the licensee is officially prohibited from operation. (Simply
7. put, the state says "no" to operations!) There are three sub-types of
8. negative statement enforcement operations: 1) denial of a new appli-
9. cation, 2) non-renewal of the license, and 3) revocation. The third
10. part of enforcement administration involves suppressive actions
11. relative to persons who have not submitted to the jurisdiction of the
12. licensing statute or have submitted but have not been officially
13. approved and now operate in defiance of the law.

14. The focus of this Statement is on the first two types of enforce-
15. ment operations: 1) positive enforcement of standards, and 2) negative
16. enforcement of standards. The third part, suppression of illegal
17. operations, with much frequency moves the consideration of enforcement
18. out of the field of regulatory laws and into the field of criminal law
19. enforcement.* For this reason it was not included in this Statement
20. as a primary item of consideration. It should be noted that many of
21. the statements will have a general applicability to enforcement
22. including suppression of illegal operations. Included in appendix
23. material is a statement as to suppressive actions in one state to

* In some states the "injunctive route" is statutorily possible and the injunction is used especially if children are in peril.

1. indicate some of the possible operational differences between this
2. type of enforcement activity and revocatory actions.*

* Appendix III. The Suppression of Illegal Child Care Operations in Vermont.

IV. Positive Enforcement of Standards:

Supervision and Consultation.

1. As indicated, positive enforcement of standards is post-license
2. issuance activity concerned with continued compliance by the licensee.*
3. Often this activity is referred to as "supervision", although in the
4. licensing statute it is usually designated as investigation and/or
5. inspection. A simple operational definition of supervision by a
6. regulatory agency could be: official observation to determine con-
7. tinued conformity to standards or other requirements. The rationale
8. for supervision in a field such as child day care is twofold: 1) it
9. aims to safeguard care after issuance of the license, and 2) it endea-
10. vors to achieve a certain "operational equity."** (In light of the

* The authors are not entirely satisfied with the phrase "positive enforcement of standards" and, later, "negative enforcement of standards". The activity carried out under each are in effect prosecutorial in nature and classifiable as enforcement: yet operationally the activity is quite different and has different immediate goals. There is need for dichotomous terms.

** In passing it is to be noted that while supervision must be viewed primarily as a preventive enforcement measure, secondary values may accrue. An important secondary value of supervisory visits is that they afford opportunity to continue the teaching and learning of the standards. Ideally the teaching of the standards was initiated at the time of the application situation and continued during the regulatory investigation. Yet in many or most instances, due to the number and complexity of the standards, the responsible learning of them is far from finished at this point. Now, in the supervisory visit the competent licensing worker can continue the teaching process. Moreover, the situation may now be more conducive to sound teaching and learning. The operator should be a little more relaxed now that he/she has been officially approved -- has "won the game" of getting a license! Also, the presence of the children in the facility and the reality of current operating problems make for a practical understanding of standards which at the time of application and investigation was not possible.

1. fact that applicants may be denied a certain license for not meeting
2. standards, it would be unfair and inequitable to permit substandard
3. operation by other licensees after approval.) This supervisory activity
4. should be regarded as preventive in that it is undertaken by the
5. regulatory agency to reduce the possible need to engage in litigation
6. at a later date. One expert in the field of administrative law,
7. Kenneth Culp Davis, puts it this way: "The supervising power is the
8. power to achieve regulatory objectives without formal action. It
9. is a concomitant of, an outgrowth from and a substitute for the
10. prosecuting power ... "

11. If the supervision program is to achieve a goal of positive
12. enforcement, it is most important that the operation be predicated on
13. a well-formulated statutory basis. Section 9 of the OCD Model Act
14. is such an example:

15. "Section 9. In exercising the powers of licensing, approving, renewing, suspending, revoking, or making probationary licenses and approvals the Department shall investigate and inspect licensees and approved operators and applicants for a license or an approval. The authorized representative of the Department may visit a day care facility or day care system at any time during the hours of operation for purposes of investigations and inspections. In conducting investigations and inspections, the Department may call on political subdivisions and governmental agencies for appropriate assistance within their authorized fields and it is authorized to contract for and effect payment for such assistance.

The licensee, approved operator or applicant shall cooperate with the investigation and inspection by providing access to its facilities, records and staff. Failure to comply with reasonable requests of the Department in connection with the investigation

and inspection is a ground for revocation of license or approval or for a denial of application. The investigation and inspection may involve consideration of any facts, conditions or circumstances relevant to the operation of the day care facility or day care system, including references and other information about the character and quality of the personnel of the facility or the system."

1. The advantage of the latter section relating to "not cooperating"
2. in investigations and inspections is its potential usefulness in
3. dealing with licensees who resist supervision generally or prohibit
4. entry to the facility specifically.

5. The statutory grant of authority to make supervisory inspections
6. should be incorporated into a formal operating policy by the licensing
7. agency. Such a policy statement should also contain significant
8. procedural details such as possible number of visits, timing of
9. visits, whether announced or unannounced, and method or manner of
10. reporting findings of facts of conformity or nonconformity. Operating
11. practices of regulatory supervision should also be clearly formulated
12. and implemented. The line licensing worker should be clear as to the
13. "ethics" of supervisory visits.* Ethical practices in supervising
14. visits include informing the licensee what standard is being inspected
15. and when it is inspected. Ethics of licensing also include timely
16. notice of negative findings so as to afford reasonable opportunity
17. for explanation and correction before "intent to revoke" or other
18. negative enforcement actions are instituted. Lastly, sound ethical

* The term "line" worker is used in its general public administration meaning: "personnel who bring the policy or the program to the people".

1. practice provides the licensee at the beginning of a supervisory visit
2. with information as to the type of report that will be forthcoming
3. following the inspection and the right to a review or hearing in the
4. event of negative findings.

5. Supervision, it will be recalled, was defined as observation after
6. issuance of the license to determine continued conformity. Thus it
7. follows that a central task of personnel training in standards enforce-
8. ment is the development of skill in reliable observation.* Analyzed
9. as an operational task, skillful observation can be broken down into
10. four elements.

11. 1. Conceptual clarity of standards: The licensing worker making
12. a supervisory visit to a facility should go into the facility with a
13. clear concept of each of the licensing standards, whether it is a
14. fairly objective one such as "adequate play space" (which may be
15. reduced to square footage) or less objective such as "nutritious meals."

16. 2. Perceptual basis: Regulatory objectivity requires that the
17. licensing worker be able to indicate the perceptual basis of the
18. observations and conclusions drawn. In documenting nonconformity, say
19. in respect to the food, it is not enough to say that the food was bad;
20. rather it should be noted that it tasted bad, looked spoiled, or smelled
21. bad.

* Reliability in observation is a critical determinant in the achievement of equal treatment and the general credibility of the regulatory agency. J. W. Lounsbury and others have made excellent contributions to this topic. For example, see: J. W. Lounsbury and others, "The Uniformity of Application of Day Care Licensing Standards", Child Care Quarterly, 1976, Vol. 5, pp. 248-261.

1. 3. Particularization of focus: Closely coupled with the need
2. for a sound perceptual basis, is the need to perceive the specific
3. relevant details. A family day care home may seem to a worker to
4. be generally bad, but from a regulatory point of view this judgment
5. must be supported by specific information such as a busy traffic
6. location, measurable inadequate play space, a substandard sewage
7. system.

8. 4. Standard grading: After inspection, a determination of
9. conformity or nonconformity must be made in respect to each standard.
10. A dichotomous grading (conforms or does not conform) operation must
11. take place. Approval to operate should be granted only in the pre-
12. sence of officially determined compliance.

13. After development of observational skills on the part of line
14. licensing workers making supervisory visits, the next important staff
15. training task is the development of a departmental pattern of "confron-
16. tation" and its "internalization" by the licensing workers. In terms
17. of an operational configuration, the parts or tasks of a confrontation
18. are fivefold:

19. 1. In the observation of nonconformity to a given standard, it
20. should be so designated to the licensee with reasons why it is deficient.

21. 2. An endeavor should be made to teach the licensee how the
22. standard might be met. Whenever possible, alternative ways of meeting
23. the standard should be offered so that the licensee can elect the
24. method most suitable for him/her.

1. 3. The licensee needs to be made aware that failure to meet
2. the standard(s) could put the continuation of the license in jeopardy.
3. Line licensing workers should not state categorically that the license
4. will be revoked because they generally do not and should not have the
5. formal authority to initiate or effect revocation, as such. Operation-
6. ally the line worker's recommendation following a determination of
7. non-compliance that the license be revoked is the first step in a
8. series of actions that lead to formal revocation.

9. 4. General or specific time limits for meeting the standard
10. should be established. Of course, there will be need for some variation
11. in time limits depending upon the situation at hand and type of non-
12. conformity in relation to present danger to children under care.
13. However, there needs to be a basis of uniformity of practice in
14. granting time limits to avoid serious inequality of treatment.

15. 5. In addition, if it is a part of operating practice, the licen-
16. see should be advised of the possibility of informal review in cases of
17. serious noncompliance and how such review may be secured.

18. Generally speaking these five directives will be given orally
19. at the facility by the line licensing worker. Later they should be
20. reduced to writing and mailed to the licensee. In the letter the
21. licensee should be informed of the presence of possible technical
22. assistance in the community, such as a "resource bank" of technical
23. services relative to child day care facility operations, which might
24. be of possible help in dealing with nonconformity situations.
25. Obviously this letter is not a formal statement of intent to revoke
26. and it should not give an impression that it is such a statement.
27. Such letters should always be cleared through proper supervisory

1. channels, with a copy to the staff person charged with overall en-
2. forcement responsibilities.

3. In brief summary, positive enforcement is a program of regulatory
4. investigation-inspection (supervision) with the purpose of providing a
5. support service to licensees so that there is a continuance of their
6. conformity to standards after licensure. It endeavors to "nip non-
7. conformity in the bud". Through the implementation of a forthright
8. pattern of confrontation the operations may be brought back to one
9. of conformity. Conceptually, positive enforcement stops short of
10. moving into the field of formal revocation and possibly adjudicatory
11. actions.

V. Negative Enforcement of Standards: Denial and Nonrenewal

1. Consideration of the types of negative enforcement will be
2. divided. First will be presented a brief treatment of denial and
3. nonrenewal and a second section will deal at greater length with
4. revocation. The reason for this division is that there is less
5. conceptual clarity in respect to denial and nonrenewal in the field
6. of child day care regulatory administration than there is in many
7. other areas of licensing such as medicine or the sale of alcoholic
8. beverages. This lack of conceptual clarity with regard to denial
9. and nonrenewal results from a number of both theoretical and practical
10. factors. Probably the most important one is the presence in the
11. licensing statute of a provisional licensure section. Provisional
12. licensure sections, as utilized in some states, result in few for-
13. mal denials of new applications. A second factor which has been a
14. source of confusion concerns the license renewal situation in
15. respect to the nature of any investigation that is to be made and to
16. the legal standing of the applicant. Both of these factors and how
17. they cause confusion and uncertainty in policy and practice form-
18. ulations are discussed in the text that follows.

19. A. Denial of Application

20. Denial is refusal by the regulatory agency to approve an appli-
21. cant permission to operate. Generally there is a provision for
22. denial in the licensing statute. For example, the denial provision
23. (Section 19) of the 1975 Texas Child Care Licensing Act states:

1. (a) If the division finds that a facility does not comply with the provisions of this Act, the department standards, department rules and regulations, or the specific terms of a license or certification, it must deny or revoke the license or certification of approval.
(b) The division must notify the person operating or proposing to operate the facility of the reasons for the denial or revocation and the person's right of appeal within 30 days of receipt of the director's notification.
(c) If the person wishes to appeal, he must notify the director by certified mail within 30 days and must state in the notification the reasons against denial or revocation. The person must send a copy of the notification to the assigned division representative.
2. In terms of operational significance, it is most important to
3. note the generally held assumption that at the point of application,
4. the would-be licensee has, in effect, full responsibility for estab-
5. lishing his or her eligibility for the license but does not as yet
6. have what is regarded as a "property right." However, after the
7. license has been issued, there tends to be an assumption that
8. licensees have an immediate vested interest, or property right, in
9. the license. The regulatory agency often has the burden of proof
10. in establishing that the license should be terminated or suspended.
11. Thus, in day-to-day regulatory operations, failure at point of
12. application to deny a license when there is nonconformity will often
13. generate serious and difficult enforcement situations at a later
14. time.
15. Although to deny a license at the point of application might be
16. operationally valid, one gets the impression as a result of systematic
17. inquiry that there are few formal denial operations as such. In child

1. day care licensing, moreover, in what few formal denials there may
2. be, a goodly number pertain to failure to meet requirements relating
3. to fire safety, sanitation, and building construction. These stan-
4. dards or requirements are generally formulated by other regulatory
5. agencies such as the Fire Marshal or Health Department. The overall
6. child day care regulatory agency generally has only the responsibility
7. of seeing that the applicant has "clearance" from the other regulatory
8. agencies. In fact, the child day care licensing authority serves
9. only as an intermediary or facilitating agency for the would-be
10. licensee, acting to request the clearance from the other regulatory
11. agencies for the applicant.* Incidentally, the poor image of child
12. day care licensing in some communities may stem partly from the long
13. delay and faulty approving operations of these other regulatory author-
14. ities, but is projected onto the child care regulatory agency due to
15. community misunderstanding of the functional responsibilities of the
16. respective agencies.

17. Where a nonconformity exists as to requirements or standards of
18. a program which has been formulated by the child day care regulatory

* The position is taken that the day care licensing agency frequently gets itself into an uncomfortable intermediary position needlessly: it is not statutory requirement and there is no formal inter-agency agreement requiring it. The net effect of serving as intermediary may be the confusion of the applicant as to his right to this service from the other regulatory agency. Inquiry of line licensing workers reveal that they seldom ever counsel an applicant to seek review or ask for a fair hearing in respect to the Fire Marshall's action or inaction.

1. agency and it is the agency's responsibility to implement and enforce,
2. often a tendency develops to "discourage" application making (or to
3. secure withdrawal of the application by a "case work" approach) rather
4. than to make a forthright formal denial. The dynamic factors for
5. this type of approach instead of a formal denial, are several fold.
6. One factor may be the presence of what might be termed an "anti-legal
7. authority mentality" in line licensing workers. With considerable
8. frequency, the line licensing worker has come out of the fields of
9. social work or child development which as professional disciplines
10. put stress upon "individualization of the child" and on the effecting
11. of change through long-term treatment or counseling relationships.
12. They dislike saying "no" and may regard the use of legal authority
13. as evidence of a "case failure." A second factor which may encourage
14. the avoidance of formal denial is that the licensing staff senses,
15. consciously or unconsciously, that many of the child day care stan-
16. dards are really "unenforceable." Judging from inquiries with line
17. licensing workers, they often see the standards as idealistic,
18. highly subjective, wishful thinking statements about how children
19. should be cared for away from (or in the absence of) their parents.
20. The staff is aware that the standards are deficient in respect to
21. tests of objectivity, practicability, measurability, equal treatment
22. and uniform operations. A third factor for a "discouraging" rather
23. than a formal denying approach may be the lack of proper personnel
24. training and staff development. Licensing staff simply have not
25. been given the technical knowledge to engage in such negative

1. enforcement actions as formal denial. Generally we are reluctant
2. to do that which we are lacking in knowledge and skills to do. This
3. is especially true if there is an alternative approach which we can
4. do well even though it is not the most appropriate approach.

5. If there is to be movement to forthright denial of the applica-
6. tion when this is an appropriate action, administrative planning and
7. consideration needs to be given the following: 1) staff development
8. of line workers relative to denial, 2) role of line supervisors in
9. regulatory investigations leading to denial, 3) availability and
10. accessibility to legal and other consultation, and 4) institutional
11. decision-making structure and operations. Each of these will be given
12. brief attention.

13. 1. Staff development. Having to do the unfamiliar may generate
14. anxiety which in turn results in a reluctance to act, or at least to
15. act decisively. Only as line supervisors and workers become, through
16. staff training, conceptually clear with regard to denial as a phenom-
17. enon of regulatory administration, may we expect to see the development
18. of a positive forthright approach in standards enforcement. It is
19. especially important in staff training relative to denial of applica-
20. tion that particular attention be given to the teaching of a "pattern
21. of confrontation" similar to that described previously in the section
22. on positive standard enforcement.* Without teaching staff how to
23. handle confrontation when nonconformity to standards is discovered,

* As previously stated, this includes putting the applicant or licensee on notice regarding noncompliance to specific standards and the need to meet them.

1. we can expect both operational insecurity and a lack of uniform
2. practice in the denial of initial applications.
3. 2. Role of line supervisor. Observation would suggest the need
4. for clearer definition of function of the line supervisor in negative
5. enforcement of standards generally, and specifically in respect to denial.
6. If the attitude of "denial of denial" in enforcement is to be over-
7. come, the duties of the line supervisor must be redefined to include:
8. 1) the making, when appropriate, of field or facility visits to pro-
9. vide a second opinion, or finding, as to the conformity or nonconformity
10. to a given standard, 2) willingness to provide informal review when
11. there is an impasse between line workers and applicants as to the
12. existence of nonconformity, and 3) being responsible for securing
13. legal and other types of consultation to support line workers' decisions
14. on conformity or nonconformity.
15. 3. Availability and accessibility of consultation. It is
16. important to recognize that denial of an application for a license is
17. a highly technical operation in the field of regulatory administration
18. and may involve the need for an expert opinion that can only be
19. given by a consultant qualified in this area. Without this consul-
20. tation service, the cautious and thoughtful line worker and super-
21. visor will be reluctant to deny an application. Moreover, the
22. question might be properly raised: is it ethically fair for the
23. licensing agency to permit staff persons to engage in this kind of
24. action decision-making without proper consultation?

1. 4. Structure for institutional decision-making. It is
2. imperative that child day care regulatory administration, as well as
3. any other type of regulatory administration, move in the direction
4. of achieving "equal treatment" and "uniform practices." Generally
5. speaking, this achievement is possible only through what is termed
6. an institutional decision-making approach. Operationally, an
7. institutional decision-making approach is achieved through the sys-
8. tematic holding of staff meetings to consider marginal licensing
9. situations. The purpose of the staffing sessions is to achieve
10. objectivity and uniformity in the decision-making. The need for an
11. institutional decision-making approach is especially important in
12. respect to the denial of applications. In a sense, it can constitute
13. a disciplining effect on the line worker in two ways: 1) the staffing
14. of "close decision" situations may serve as a defense against impul-
15. siveness, partiality, and subjectivity in decision-making; and 2) the
16. presence of the reports of previous staff decisions provides a
17. "historical memory" which staff workers can draw upon in order to
18. think, perhaps more rationally, in respect to a present situation.

19. The need for the development and refinement of an institutional
20. decision-making approach is most important in respect to achieving
21. uniform practices in "provisional" license issuances and in applying
22. the concept or principle of "substantial compliance." Regarding the
23. first, many or most child day care licensing statutes provide for
24. "provisional" licensing. Section 3d of the OCD Model Act, for example,
25. provides:

1. ...If the results of the investigation satisfy the Department that all of the applicable rules and regulations cannot be met immediately but can and will be met within six months or less, and the deviations do not threaten the health or safety of the children, then a provisional license ... shall be issued for a period not to exceed six months from the date of such issuance.
2. Practically speaking, some type of provisional licensing is essential.
3. The Model Act section seems well constructed. Unfortunately, many
4. states have provisional license sections which are not as well stated.
5. With much frequency they lack proper and sufficient statutory guide-
6. lines as to issuance. The net effect seems to be to give the
7. licensing agency an invitation to engage in inequitable operations.
8. Moreover, poor provisional licensure sections may serve to generate
9. a sort of substandard child day care system. In some states it is
10. possible to renew provisional licenses up to a period of two years!*
11. In all states it is difficult to terminate an operation once begun.
12. The matter of provisional licensure is raised at this point to explain
13. how improper, unsupervised implementation of provisional licenses is
14. conducive to not coming to grips with forthright denial of unsatis-
15. factory applications. For example, a recent (1976) annual report
16. of licensing operations from a state in which all new applications go
17. the "provisional licensure route", shows for the year: 50 provi-
18. sional license applications received, 1 denied!
19. The licensing agency acceptance of a sort of free-floating

* Presently OCD is having a comparative study made of child day licensing statutes and standards. Greater specificity as to the nature of provisional licensure should be available shortly.

1. "substantial compliance" concept (often meaning questionable conformity) in respect to certain standards can also become the means for
2. temporizing in order to avoid forthright denial of some applications
3. which in fact do not and probably never can fully meet the standards.*
4. A properly operated institutional decision-making approach (systematically staffing and scrutinizing these marginal situations)
5. should reduce or eliminate the "denial of denial" in enforcement.

8. B. Note on Nonrenewal

9. What has just been said in respect to denial of an application for
10. license might be thought of as being generally applicable to "nonrenewal" of
11. a license in that it is in essence a denial of a reapplication for a
12. license. In light of uncertainty, confusion, and disagreement as

* One of the evaluators of the original draft indicated need for fuller comment on substantial compliance. We would add the following: In child care regulatory administration frequent use is made of the term "substantial compliance" or reasonable compliance. Yet, users of the term, when asked to define or explain it, do so only with difficulty. The term seems to be a sort of a "trade mystique". There seems also to be little or no treatment of the term in the general professional literature on regulatory administration or law. The authors of this statement take the position that substantial compliance is not "near" compliance or "overlooked" minor standards. Rather, it is held that the term implies acceptable compliance with the "substance" of the requirement. When a minor deficiency exists it is not consequential to the goal of safeguarding. When it is of greater significance, the deficiency is only of a temporary nature soon to be corrected. (When this is the situation, it is noted in the letter of transmittal of the license.) The key thought in substantial compliance is that there is no intent not to meet the requirement. This contrasts with waivers, and possibly variances, in which there is intent not to meet the standard.

1. to what license renewal really is, a special note on the subject
2. is made: most state child day care licensing statutes have pro-
3. visions which limit the duration of the license to one or two
4. years. Then there is a further provision relative to the need
5. to "apply" (or "reapply") in order to have official approval to
6. continue to operate. These sections may spell out the procedure
7. for reapplication and/or renewal. However, there is little or
8. no legislative directive as to whether or not the renewal of a
9. license is to be subject to a regulatory investigation de novo
10. (as though it was a "brand new" application for a license) or it is
11. to be an "on the record" type of investigation. The uncertainty
12. as to what a license renewal really is inevitably produces uncertainty
13. as to the legal standing of the re-applicant: does the vested inter-
14. est created by the previous licensure give that person a different
15. standing from the person who has never been licensed before?
16. Operationally, the question becomes, "Does the burden of proof
17. shift (partially or totally) from the applicant's fully having to
18. establish his eligibility for a license to the department's having
19. to show reasons for not continuing or not renewing the license?"
20. Until there is greater clarification of the nature of license re-
21. newal there will probably be continued insecurity and unsureness in
22. the denial of applications for renewal even though the general
23. principle is that once the right has been vested, it cannot be
24. terminated except for proper cause and under acceptable procedural
25. safeguards.

1. In passing, it might be noted that one way of eliminating
2. this uncertainty and confusion in license renewal would be to
3. eliminate the renewal provision in the statute. Observation
4. indicates that present renewal provisions tend to increase paper
5. work while accomplishing little in safeguarding child day care.
6. Some licensing staff are so busy "racing the calendar" to get
7. renewals finished that there is little or no time for wholesome
8. constructive supervisory visits. A policy of permanent licensure
9. only after a full and complete meeting of all standards, followed
10. by a well-implemented program of periodic supervision and possibly
11. consultation visits, might be operationally preferable. Non-
12. conformity would be dealt with by the staff making the supervisory
13. visits. Continued nonconformity would subject the licensee to
14. the revocation of the license as now provided for. The net effect
15. of eliminating renewal provisions would be to eliminate a confused
16. area of standards enforcement. It should, of course, be noted
17. that in light of present operational realities the renewal often
18. serves the useful purpose of insuring an evaluation and that if the
19. license is issued for an indefinite period, revocation is the only
20. means of terminating it against the licensee's wish. Of course, it
21. goes without saying that a state should not move towards elimination
22. of the renewal without full review of its past renewal operations.
23. There should be a plan for periodic supervisory visits if renewal is
24. not present.

VI. Negative Standards Enforcement: Revocation.

Note: This section on "Revocation" has been developed at somewhat greater length due to the importance of the topic. From a practical standpoint child day care licensing standards will not be enforced until regulatory staff become knowledgeable and skilled in respect to revocation actions. In the revocation situation and the possible attending administrative hearing, there is truly a working through, a community resolution, of how far the state may go in the safeguarding of children in facilities once they have been licensed, and thus officially approved.

1. The Latin basis of the word "revoke" means to "call back."
2. Licensure revocation as used in this Statement means the official
3. termination of previously granted approval to operate in an otherwise
4. legislatively closed area of activity. The basis of termination is a
5. finding of noncompliance with provisions of the licensing statute,
6. licensing agency standards, the rules and regulations, or conditions
7. of the license or any or all of these. Generally, in child day care
8. licensing acts as in most licensing laws, there is a specific revoca-
9. tion provision. While it is desirable to have such a revocation
10. section in the statute, authority to terminate is generally deemed
11. to be implicit in the power to grant approval. Whether or not the
12. power to revoke is explicit or implicit, the burden of proof of
13. establishing the basis of termination rests with the licensing agency.
14. Operationally this is in contrast to new applications, where the
15. burden of proof of establishing license eligibility falls on the
16. applicant.

1. Generally, licensing statute revocation sections also contain a
2. provision for a formal administrative hearing. The Texas 1975 Child
3. Care Act, Section (19) regarding the right of the licensee to a
4. formal administrative hearing is, perhaps, typical as notification
5. to licensee of the hearing but not as to who will conduct it:

6. "(b) The division must notify the person operating or proposing to operate the facility of the reasons for the denial or revocation and the person's right of appeal within 30 days of receipt of the director's notification.

"(c) If the person wishes to appeal, he must notify the director by certified mail within 30 days and must state in the notification the reasons against denial or revocation. The person must send a copy of the notification to the assigned division representative.

"(d) Within two weeks following the date the appeal notification was mailed, the director shall notify the person that the request for an appeal hearing is denied, or he shall appoint an advisory review board to hear the appeal."

7. Section J of the OCD Model Act states, in part:

8. "(a) The Department shall have power to suspend, revoke, or make probationary a license or approval if a licensee or approved operator is found not to comply with the rules and regulations of the Department respecting day care facilities or day care systems.

"(b) A licensee or approved operator whose license or approval is about to be suspended, revoked or made probationary shall be given written notice by certified or registered mail addressed to the location shown on the license or approval.

"The notice shall contain a statement of and the reasons for the proposed action and shall inform the licensee or approved operator that there is a right to appeal the decision to the director in writing within 10 days after the mailing of the notice of the proposed action. In the case of a license, upon receiving a timely written appeal the director shall give the licensee reasonable notice and an opportunity for a prompt hearing

before a hearing examiner with respect to the proposed action. . ."

1. As noted above, the section may specify the person(s) and the method
2. of conducting the hearing and the making of the report. Some of this
3. information may be contained in the administrative procedure act, if
4. the jurisdiction has one, and in other sections of the general statutes
5. of the state. General observation indicates that child day care
6. licensing personnel are frequently unfamiliar with the administrative
7. procedure act and the functions of administrative procedure agencies.*

8. Besides this introductory section, these five topics will be
9. considered in relation to revocation: complaint taking, complaint
10. investigation, pre-revocation considerations, revocation actions, and
11. appeal to the courts.

12. A. Complaint Taking

13. The content of this subsection is concerned with reports of non-
14. compliance to standards and/or other requirements relative to licensure.
15. The discovery of noncompliance (actual or alleged) may be dichoto-
16. mized into groups of persons (reporters): 1) licensing staff or 2)
17. "outsiders," i.e., third party complainants. This subsection is parti-
18. cularly concerned with this second group, namely third party complainants.**

* See Appendix IV, Model Statute for a State Administrative Procedure Act with an Introductory Note.

** When a licensing worker in the course of a supervision visit discovers nonconformity to specific standards there should be confrontation with the licensee, and if correction does not take place, then licensing agency may move to pre-revocation considerations, as discussed in positive enforcement of standards.

1. A preliminary consideration in complaint taking is that the
2. licensing agency program should have as one of its aims the education
3. of the community to participate in standards enforcement. One way
4. in which the community can participate is through responsible reporting
5. of possible situations of nonconformity. For community persons to
6. engage in responsible reporting, the licensing agency must have carried
7. on a program to make the community aware of the nature of child day
8. care standards and to provide specific instruction on where and how
9. to make reports of possible nonconformity, violations or irregular-
10. ities. To beam this interpretative material to persons in positions
11. to make valid observations as to proper care requires research regard-
12. ing possible categories of reporters. Findings from previous analyses
13. indicate that the following categories of persons may be expected to
14. report complaints: 1) users of day care facilities and relatives of
15. users; 2) public and community agency personnel, including teachers,
16. police, public health nurses, social workers, and other regulatory
17. inspectors; 3) "ex"-staff of licensed facilities; and 4) other licen-
18. sees (who probably report non-licensed operators more than they do
19. nonconformity of licensed providers). One device that might increase
20. the number of parents reporting is a requirement by the licensing
21. agency that licensees of a child day care facility issue a set of the
22. standards to every new user. The list of standards should also contain
23. information on where and how to report possible violations.

24. Another preliminary with which the licensing authority needs to
25. deal before it "commences the business" of complaint-taking is to

1. have a clearly formulated operating policy regarding "anonymous"
2. complaints. Observation indicates considerable difference, uncertainty,
3. and confusion in respect to operating practices in complaint taking.
4. It is most important that licensing staff clearly understand the
5. possible difference between a regulatory complaint and a child protec-
6. tive care complaint. The legal reference in a complaint proceeding
7. against a licensed (regulated) facility is the civil law, although
8. revocation proceedings have been characterized as "penal in nature".
9. On the other hand, the point of reference in proceeding against an
10. adult person who abuses a child is likely to be the criminal law.
11. Thus the pattern of handling anonymous complaints in these areas
12. of child welfare should reflect the possible different legal bases of
13. operations.

14. Regardless whether or not the complaint is anonymously made,
15. there is an operational advantage in proceeding as follows: 1) the
16. complainant should be given, at the beginning of the interview, an
17. opportunity to develop fully his or her statement in a manner he or
18. she considers appropriate; but before the interview is completed, an
19. effort should be made to focus the report on specific standard vio-
20. lations. 2) One should also attempt to secure as specifically as
21. possible the dates and places of incidents of violations, basis of
22. perception, and the complainant's identity, including address, place
23. of employment, and telephone number. 3) An attempt should be made to
24. secure names and addresses of other persons who might have observed
25. or could substantiate the violation. 4) A determination should be

1. made as to the complainant's willingness to participate in the
2. investigational activity and revocatory action as a witness in a hearing
3. as well as an opinion regarding the willingness of possible other wit-
4. nesses to participate in this role. 5) If the situation indicates
5. it, the complainant should be advised about possible consequences of
6. a complaint investigation, and the licensing agency policy and prac-
7. tice with regard to reporting back to the complainant as to the actions
8. taken.* 6) An effort should be made to appraise the complainant and
9. to evaluate the possibility of harassment. At the present time we
10. lack any well-established operations practice for this type of
11. appraisal. However, observation of the manner in which the complainant
12. speaks, indicating the presence or absence of marked anxiety, hostility,
13. or paranoid feelings, may be helpful in evaluating the report and
14. determining whether or not harassment is a factor. The possible
15. motivation for "attack," as might be present in a recently discharged
16. employee, needs to be noted as does the internal consistency of the
17. report. Also if the licensing agency keeps a file of persons making
18. complaints, this should be checked. In some communities one find
19. small groups of "hard core" complainants, especially users, who
20. constantly complain. Often such complaints follow a "break" with
21. the provider over such matters as nonpayment, provider refusing to
22. make exceptions to hours or days of care, and disciplining or not
23. disciplining the child. In some instances the "break" seems to occur

* In fact the licensing agency needs a clear operating policy, not only on reporting back to complainant but also with respect to notifying the licensee that the complaint investigation has ended and the general nature of the findings as to possible violations or not, as the case may be.

1. after the child has developed an affectionate relationship with the
2. caregiver, resulting in the parents' feeling threatened or defensive.
3. In any event, the relationship between the complainant and the care-
4. giver should be explored and the results should be carefully docu-
5. mented in the licensing record.

6. B. The Complaint Investigation

7. In this section, consideration will be given mainly to complaint
8. investigations that lead, or may lead, to revocation and possibly
9. adjudicative actions. Generally, material previously discussed
10. relative to supervisory visits for the purpose of positive enforce-
11. ment will not be repeated. Thus we will not discuss further confron-
12. tation with a licensee when a finding of nonconformity is made by
13. the licensing worker in the course of a complaint investigation. The
14. pattern of operation would be the same as in a positive enforcement
15. supervisory visit.

16. Three items of consideration in embarking on a complaint inves-
17. tigation, initially reported by a third party, will be presented.
18. One relates to notification that a complaint has been made. The
19. second deals with the confidentiality of the complaint investigation.
20. The third pertains to "counter charges" by a licensee. However,
21. before beginning the enumeration of items of consideration, this
22. prefatory comment should be made: The operating policy which governs
23. announced and unannounced supervisory visits should be such that it
24. will not impede making these investigations unannounced. The controlling

1. principle as to the type and pattern of investigation is the nature
2. and degree of risk to the children under care!

3. A first item of importance that needs operational consideration

4. is the point of notification of the licensee that a complaint has

5. been filed and that a complaint investigation is contemplated, under

6. way, or has been completed. Observation of operations of several

7. child day care licensing agencies indicates not only variation from

8. one state to another in this matter but also variation from one worker

9. to another in the same state, sometimes even in the same local office.

10. Although some do, probably most child day care licensing acts contain

11. no specific statutory directive as to notifying the licensee of a

12. received complaint. Likewise the local manual may be silent on noti-

13. fication. Thus the way a worker proceeds may reflect not only the

14. varying degree of his or her conceptual awareness of regulatory

15. administration but also the insecurities and anxieties derived from

16. being in an enforcement investigative role. Regardless of what the

17. operating practice may be in respect to notification, it is highly

18. desirable that a clearly stated operating policy be formulated in

19. order to give firm directions to actual practice. Moreover, both

20. policy and practice in respect to complaint investigation should be

21. communicated to all persons when they apply for a license and again

22. at the time of issuance of a license. The licensing agency should

23. make it clear to all licensees that the possibility of a complaint

24. investigation is a "fact" of regulatory life.

1. A second item of administrative consideration relates to the
2. confidentiality of a complaint investigation, especially while it is
3. in progress.* With much frequency the first "test" of confidentiality
4. of the investigation record comes when the licensee is told that a
5. complaint has been filed and there is a "demand" by the licensee to
6. know the name of the complainant. In the absence of statutory pro-
7. visions to the contrary, the licensing agencies should be able to
8. refuse to reveal the name of the complainant -- certainly at this time.
9. This is a matter of judgment and, at times, of keeping faith with the
10. complainant who may insist on anonymity during the investigation but
11. who should have been told at the outset that effective action may be
12. difficult or impossible unless he or she is willing to testify at
13. a future time, or at least to have his or her name revealed to the
14. licensee. In any event, overt or covert resistance from the licensee
15. which may follow the licensing agency's refusal to identify the com-
16. plainant is more easily dealt with from the viewpoint of enforce-
17. ment if the licensing statute contains a proviso that refusal to
18. cooperate in an investigation may become the basis for revocation
19. action. Section 8 of the Illinois Child Care Act of 1969 reads:
20. "The Department may revoke or refuse to renew
the license of any child care facility, or refuse
to issue full license to the holder of a permit
should the licensee or holder of a permit:

(5) fail or refuse to submit to an inves-
tigation by the Department;

* The intent of this section is not to deal generally with the confidentiality of licensing records. There is much need for full research of that topic. This section makes only a speculative comment as to the possible closedness of investigative reports of complaints.

(6) fail or refuse to admit authorized representatives of the Department at any reasonable time for the purpose of investigation; . . ."

1. The licensee's second test of confidentiality of the investi-
2. gation may come in the form of a request to have access to the licensing
3. record. Recently passed legislation dealing with openness of public
4. records, while not necessarily applicable to this situation, may well
5. contribute to the request's being made. Again, in the absence of
6. statutory provisions to the contrary, and if the licensing agency
7. has engaged in appropriate record keeping, the request may, under
8. certain circumstances, be properly refused. Appropriate record keeping
9. must therefore include keeping the investigative material in a
10. separate file from the content of the "regular" records and it should
11. be so labelled. Moreover, it should be definitely acknowledged to
12. the licensee that such a separate file exists. Noninvestigative
13. material should not be included. Following the completion of the
14. investigation and the making of a decision to proceed towards revo-
15. cation, the licensee will, of course, have access to all facts and
16. names on which the statement of accusation and issues is based. It
17. should be noted here that the trend is contrary to "confidentiality"
18. and that, in recent years, legislatures and courts have acted to
19. open formerly "closed" records to persons who have a vital interest
20. in their content.

21. The third item of consideration is this: During the course of
22. a complaint investigation one frequently encounters one or both of
23. these "counter charges" by the licensee: 1) the standard in question

1. is not enforced elsewhere; 2) the previous licensing worker approved
2. it or, at any rate, did not question it. These statements are
3. sufficiently perennial to warrant brief comment. The first, "others
4. do it (or don't do it), so why pick on me?" may certainly present not
5. only a public relations but also an "equal protection" problem to
6. the licensing agency. In terms of enforcement administration, ex-
7. cept where there is a well known history of the fact, nonenforcement
8. in respect to another person does not constitute a valid defense per
9. se against improper performance. However, if there is a real uneven-
10. ness in, or lack of, enforcement in some localities, this might be
11. viewed as a mitigating factor, as well as a denial of the equal
12. protection of the laws. In either case, the licensee will still
13. have the burden of proof in establishing the validity of the charge of
14. selective enforcement. Proving uneven enforcement may be quite
15. difficult due to lack of public visibility of "standards conformity
16. or nonconformity," especially in respect to the so-called nonobjective
17. standards.

18. The second charge, "it was approved or not questioned by previous
19. workers," even if true, does not constitute a valid basis for not
20. meeting the required standard at this time unless there is a legiti-
21. mate bar or an "estoppel" present. Estoppel requires a detrimental
22. reliance on the representation. Therefore, in these estoppel instances,
23. the licensee would have the burden of not only establishing that the
24. declarations or affirming actions of the previous licensing worker
25. induced him or her into a false belief that the standard was met or

1. that the failure to meet it did not matter, but also that the licen-
2. see reasonably relied on this representation in a substantial manner,
3. changed position, and would be seriously and unfairly disadvantaged
4. by a present effort to enforce compliance with the standards. Dealing
5. with the "perennials," as well as other investigative problems, estab-
6. lishes firmly the need for readily accessible legal consultation during
7. this phase of operations and to the pre-revocation considerations
8. which follow the investigation but precede revocation.

9. C. Pre-Revocation Considerations

10. When the regulatory investigation or inspection establishes non-
11. compliance with the standards, the licensing agency should give atten-
12. tion to a number of important considerations before proceeding to
13. formal revocation.*

14. One item of consideration arises when the licensing statute pro-
15. vides that as a basis of revocation the noncompliance must be determined
16. as "willful". In respect to "willful", it is important to note that
17. in regulatory administration the factor of "intent" may not have to
18. be established: rather, it need only be shown that the licensee was
19. "consciously aware" of what he or she was doing.

✓ * It goes without saying that when the noncompliance relates to the health and safety of children the licensing agency may immediately seek an injunction if that is possible. (Some licensing statutes specifically stipulate this in respect to the use of the injunction.) In the case of child abuse by the licensed provider or facility staff, the licensing agency alone, or perhaps in conjunction with a "protective" service agency will act to ameliorate the situation. In some instances the provider will be dealt with immediately under the criminal law. The important point is to note that all these possible actions are in the absence of a specific court order to the contrary. The licensee is entitled to notice and hearing relative to license revocation. It should be recognized that revocation is not a "speedy" rescue operation.

1. Secondly, before proceeding to formal revocation action, the
2. licensing agency should give close attention both to the availability
3. and credibility of witnesses. In an activity such as child day care,
4. which deals to a great extent with preschool children, it goes without
5. saying that the establishing of the credibility of witnesses may present
6. a special problem.

7. A third item of consideration is whether, although the noncon-
8. formity is definitely present as far as the licensing staff is concerned,
9. the case has been documented properly and in a detailed way. The
10. presence of proper documentation of nonconformity may contribute
11. greatly to the licensing worker's testifying confidently and effectively.

12. The fourth consideration is that a licensing agency operating
13. in a field such as child day care must give full and serious consider-
14. ation to the possible impact of a revocation action on the children
15. presently in care and perhaps on other children not under immediate
16. care but who might soon be in need of care. This "impact" aspect,
17. it needs to be noted, is really two-fold: 1) the impact during the
18. pendency of the action, including the time to arrange for and conduct
19. a possible hearing, and 2) the impact as a result of closing the
20. facility.

21. The "impact of possible revocation on children" will receive
22. somewhat greater comment because it raises the question of possible
23. measures short of revocation. In approaching the question of whether
24. there are ways to deal effectively with nonconformity short of revo-

1. cation, one assumes that the licensing agency has given full con-
2. sideration to informal review and has provided any formal "pre-
3. hearing" service prescribed by the statute or by its own formal
4. rules. Also, it is assumed that the licensing record will show that
5. consideration was given to the possible impact of revocation as
6. well as the rationale for the ultimate decision. Generally speaking,
7. an examination of child day care licensing statutes does not readily
8. indicate the availability of measures short of revocation. Temporary
9. suspension of child care licenses is held by some not to be a useful
10. device except as a means to compel an otherwise satisfactory oper-
11. ation to comply with such requirements as fire clearances or physical
12. deficiencies of the building.* However, several questions arise
13. which, if answered in the affirmative, might lead to some pragmatically
14. useful practices: one can ask whether the presence of a provision
15. conferring great power such as ordering revocation and suspension
16. carries the authority to stay the execution of an order to suspend
17. if certain stipulations are agreed to? It is generally agreed
18. that the power to revoke includes the power to do something less
19. drastic, such as imposing probation. Another question concerns enforce-
20. ment strategy. In some instances where statutory provision exists
21. for so doing, would it not be more constructive to try to petition

* Perhaps a better case can be made for suspension in day care than in twenty four hour care. However, both are discommoding to the user, costly to the provider (and perhaps demoralizing to staff) without a forthright resolution of the controversy.

1. a court to enjoin rather than to revoke?* An order by the court to
2. enjoin might be a motivating factor in moving the licensee from a
3. pattern of noncompliance to one of compliance.

4. In concluding this comment on measures short of revocation, it
5. is important to state that this question is currently receiving some
6. attention from the field of child care regulatory administration.
7. There is need, however, for more dialogue and discussion of the
8. value of "warnings," the feasibility of statutory provisions for
9. "cease and desist" orders, and the legality and utility of "fines"

10. D. Revocation Actions

11. Once a valid determination of substantial noncompliance with
12. standards has been made and prerevocation considerations provide no
13. basis for failing to proceed, formal actions to revoke are usually
14. initiated by sending the licensee a Letter of Intent to Revoke. This
15. letter will provide the licensee with the bases of action, giving
16. specifics of the nature of the violations, and reciting the facts
17. as well as the standards involved. The licensee is also informed by
18. letter of his or her rights to a hearing and how demand for a hearing
19. is made. This Letter of Intent to Revoke may or may not be written
20. by licensing staff personnel, but sound operating practices would be
21. that it is formulated in conference with legal counsel. The contents
22. of this section on formal revocation actions will now be presented

* The use of the injunction as an alternative to revocation (apart from its use when children are in peril) may not "sell" in all states. However, in states where the statutes permit it and there is an "administrative will" to use it, it is worth considering.

1. under these two headings: 1) proceedings following Letter of Intent,
2. and 2) the nature of the hearing.

3. 1. Proceedings Following Letter of Intent

4. Ordinarily the lawyer who will be responsible for the presen-
5. tation of the case at the formal hearing or in court will take charge
6. at this time. If the Letter of Intent came from the lawyer, this
7. has already occurred. If the Letter came from the licensing agency's
8. nonlegal staff, responsibility should now be shared or shifted to
9. the attorney in charge.

10. The letter of Intent will set out the steps the licensee may
11. follow to ascertain whether the license will be surrendered; whether
12. the operation will be terminated; whether and what corrections will
13. be made if this is still negotiable; or, finally, whether a hearing
14. will be demanded. Usually, a fairly short deadline of ten to thirty
15. days is fixed during which the licensee must respond and if he or
16. she does not, the revocation becomes effective and the establish-
17. ment is subject to being closed down. The agency should always allow
18. enough time to enable the users to make other arrangements. Sometimes,
19. and always when closure is sudden, the families whose children receive
20. care at the facility become the victims of the termination. Obviously,
21. when there is real danger to the children, this danger should be the
22. overriding consideration, but convenience and need should be taken
23. into account.

24. If there is neither timely request for a hearing nor agreement

1. to terminate the operation, the only remaining problem is making
2. sure that the facility is actually closed. Occasionally, the former
3. licensee will resort to subterfuge, such as attempting to call the
4. place a school and claiming the exemption sometimes available to
4. bona fide schools.

5. As soon as a demand for a hearing is received, the case should
6. be calendared. How this is done will depend on the governing legal
7. system. The laws of some states require service of a formal complaint
8. or accusation at this point. Where this is true, the papers will be
9. prepared by the lawyer in charge and will be served on the licensee
10. who may, once again, have a given period of time to respond. In
11. that event, the same pattern which follows the Letter of Intent
12. may have to be observed again. The time allowed for a response --
13. again usually ten to thirty days -- must elapse before the next step
14. can be taken.

15. It is theoretically possible to advise the licensee of a future
16. preselected hearing date at the time the formal pleadings are served,
17. but this is rarely effective and is not recommended. Preferably,
18. the setting of the case should be deferred until it is known whether
19. or not the licensee actually wants a hearing, whether there will
20. be representation by counsel (and if so, the lawyer's name), and
21. until it has become possible to make a reasonable estimate of the
22. probable length of the hearing, including ample opportunity to enable
23. the licensee to present a defense.*

* Sometimes the filing of a request for a hearing seems merely to
to be a stalling device.

1. When the case is ready to be set, either by virtue of the re-
2. action to the Letter of Intent or following another more formal step,
3. the attorney in charge will obtain a hearing date, or dates, from
4. the appropriate source. It is highly advisable to involve the licen-
5. see in this process and vital if it is known that there will be
6. representation by counsel, so that calendar conflicts may be avoided.

7. It is hardly necessary to emphasize that formal revocation pro-
8. ceedings in the face of opposition often take a long time -- far
9. longer than those responsible for the welfare of the children usually
10. like to see -- and that it is normally in the interests of the licensee
11. to delay the termination as long as possible. Some of the delays
12. can be avoided by advance planning. For example, a lawyer who has
13. agreed to a date for the hearing will not receive much consideration
14. when, at the last minute, he claims that the date is not convenient
15. or that he has to be in some other court. A licensee may wait
16. almost to the date of the hearing before trying to retain counsel
17. and then, if the hearing date is too close, a busy lawyer may almost
18. be expected to have other commitments. To insist on a hearing date
19. chosen without participation of counsel poses an unpleasant problem
20. for the agency: if the agency agrees to a postponement, a substandard
21. operation will continue that much longer; if the agency refuses, it
22. will be charged with trying to deny the licensee the right to counsel
23. and to due process of law. Experience also shows that if the agency
24. said "No" and the recently retained attorney for the licensee goes to
25. court, extensions of time usually will be granted.

1. Another important factor is "discovery" -- the legal process by
2. which legal systems permit one party to make demand on another party
3. for disclosure of relevant information, including evidence it plans
4. to use at the hearing. This process, which may or may not involve
5. the taking of formal statements or depositions of witnesses prior
6. to the hearing, will occur during the interval between service of the
7. formal papers and the hearing date. Usually there is a fixed time
8. within which discovery must be sought, but the licensing agency is
9. well advised to be liberal and to make the evidence available in any
10. event. Here, too, if the period between the employment of counsel
11. and the hearing date is too short for effective discovery, this lack
12. of time will, in jurisdictions where discovery is part of the system,
13. provide still another argument for postponement and a further oppor-
14. tunity to claim that a refusal to postpone the hearing amounts to
15. a denial of due process.

16. In any event, the agency attorney will see to it that a proper
17. "Notice of Time and Place of Hearing" is served on the licensee and
18. opposing counsel, if known, well in advance of the hearing and that
19. proof of the service is available. Personal service, though highly
20. effective, is normally not required. Service by regular mail is
21. generally sufficient, but it is advisable to use certified or
22. registered mail because the quality of the proof of service is far
23. better. A copy of the notice should be sent to the court or the
24. administrative or quase-judicial agency which will conduct the hearing.

1. It is advisable, even when this is not required, to provide the
2. tribunal with copies of all other significant procedural documents
3. in advance of the hearing to enable the adjudicator to acquaint
4. himself with the issues of the case; to prepare himself for the
5. hearing by reading (or rereading) the significant statutes and
6. regulations; to resolve questions he may have, possibly by conferring
7. with both counsel; and in general to make plans for his role in the
8. proceedings.

9. During this same period, the discovery process will be completed
10. and the attorneys will interview potential witnesses; will select
11. those whose testimony will definitely be used at the hearing and
12. prepare them thoroughly by going over the testimony in detail and
13. by anticipating, as far as possible, questions the witness may be
14. asked under cross-examination by opposing counsel; will obtain state-
15. ments or other physical evidence needed for the hearing, such as
16. photographs, court, hospital, policy, bank or other business records;
17. will see to it that the necessary subpoenas are obtained and served;
18. and that the appearance of witnesses is scheduled in an intelligent
19. manner to avoid unnecessary waiting around.

20. In brief, during the period between the service of the Letter
21. of Intent, or whatever formal notice is required, the lawyer will
22. do all the things usually and customarily needed in preparation for
23. any fairly formal judicial or quasi-judicial proceeding so that,
24. when the time comes, and he is asked whether or not he is ready to
25. proceed, he can confidently reply: "Yes, your Honor!"

1. 2. The Nature of the Hearing.

2. The purpose of the hearing is to determine whether legal cause
3. exists for revocation of the license. Normally, this means that the
4. hearing represents a method of testing whether or not the licensing
5. agency can establish, ordinarily by a preponderance of evidence, that
6. the licensee has failed to comply with the standards in a manner and
7. to a degree warranting the termination of his right to engage in
8. the licensed activity, a right generally regarded as a vested property
9. right protected by the "due process" clause of the 14th Amendment of
10. the United States Constitution. This principle is true even though,
11. in the minds of many people who have considered the problem, child
12. care is not regarded as a "business" in the ordinary sense. It is
13. also true that the proceedings are identical to those governing the
14. revocation of other business and professional licenses despite the
15. substantial differences between the governing regulatory bodies and
16. the social and economic factors involved.

17. In some jurisdictions, proceedings to revoke licenses must still
18. be brought before the regular courts. In those instances, there is
19. a trial, governed by the same rules applicable to all other trials,
20. resulting in a final judgment which binds the parties unless it is
21. successfully appealed.

22. In the great and growing majority of jurisdictions, however,
23. the hearings in license revocation cases are conducted before a quasi-
24. judicial tribunal. Usually, the governing law prescribes the qualifi-
25. cations of the person who will preside over the hearing. Some of the

1. titles currently in use are "Hearing Examiner," "Hearing Officer,"
2. "Referee," and "Administrative Law Judge." The procedure is ordinarily
3. found in the same statute, an "Administrative Procedure Act" of some
4. kind, but it may be spelled out in the licensing statute itself.*

5. The quasi-judicial forum and the adjudicator are part of the
6. executive rather than the judicial branch of government, a distinction
7. which must always be kept in mind. However, at the hearing the
8. adjudicator's role is very similar to that of a judge of the judicial
9. system. He presides over the hearing, rules on motions and objections,
10. and usually has authority to issue subpoenas. Above all, he must be
11. impartial. Ideally, he is independent of the licensing agency of the
12. "Department" housing the agency.

13. The two most important differences between a judge and a quasi-
14. judicial officer are 1) that the authority of the latter is usually
15. limited to making recommendations to the licensing agency, as distin-
16. guished from the finality of a court judgment, and 2) that he does not
17. have the same powers of contempt held by a court of law.

18. The lack of power to make final decisions (subject only to
19. appellate review) generally makes it legally impossible for the quasi-
20. judicial officer to grant motions which could dispose of the case
21. at an early stage and which are available and frequently invoked in
22. the courts. Examples are motions to dismiss the proceedings, motions
23. for summary judgment, and pleas in abatement. The reasoning is that

* See Appendix IV. The Model State Administrative Procedure Act with an Introductory Note.

1. if the express grant of power of the adjudicator extends only to
2. the making of recommendations at the end of the proceedings, the power
3. must be equally limited during the earlier phases since it would be
4. altogether illogical to give the presiding officer more authority during
5. the procedural and early phases of the hearing than he has after he
6. has heard all the evidence and all the legal arguments. This prin-
7. ciple applies regardless of whether the adjudicator is part of the
8. administrative agency's own staff, comes from an independent office
9. within the executive branch, or is employed from the outside on an
10. ad hoc basis.

11. In addition to the presiding officer, the participants in the
12. hearing will include a representative of the licensing agency, counsel
13. representing the government official who initiated the proceedings, the
14. licensee and his counsel (if there is legal representation, which
15. is always permitted though not required), usually a person who will
16. record the proceedings, such as a court reporter or someone who
17. operates a mechanical recording device, witnesses, and other interested
18. parties.

19. In addition to these participants, some systems permit someone
20. with a real interest in the proceedings to become recognized as an
21. "intervener." An example would be the parent of a child receiving
22. care in a facility who may be able to become a true party to the pro-
23. ceedings, especially if he wishes to oppose the termination of the
24. license. Where intervention is not permitted, such persons would be
25. limited to the roles of witness or spectator.

1. Ordinarily, license revocation hearings are open and public and
2. will be closed only under circumstances which would warrant the
3. closing of a court room door. An example would be a case involving
4. serious sexual misconduct against a young child. In recent years,
5. the trend has been toward open hearings even where elements of embar-
6. rassment and adverse emotional reactions may be involved.

7. The hearings are generally quite formal and bear more resem-
8. blance to a court trial without a jury than to the conference round
9. table type of approach recommended for, and usually found in, public
10. assistance "fair hearings."

11. Ordinarily, the "complainant's" case will be presented first,
12. to be followed by the licensee and, if allowable, the interveners.
13. All testimony is given under oath and at the conclusion of the "case
14. in chief" there is an opportunity for rebuttal evidence as well as
15. oral arguments. At his discretion, the presiding officer may also
16. request or accept written briefs.

17. The rules of evidence governing administrative hearings are
18. usually not as rigid as those governing proceedings in the judicial
19. system, but they must not be so loose that they offend "traditional
20. notions of fair play and substantial justice," or the courts will
21. conclude that a denial of due process of law has occurred.

22. Following the hearing, the arguments, and the filing of briefs,
23. if any, the adjudicator prepares a document in which, depending on
24. the specific terms of the governing statutes and regulations, he will

1. make findings of fact, apply the governing law, and determine whether
2. cause was established for revocation of the license or perhaps a
3. lesser form of sanction; further, he will decide whether or not any
4. action should be stayed or that probation be granted on condition
5. that the standards be met or that other enumerated conditions be
6. fulfilled.

7. In conclusion, the adjudicator will recommend action to the
8. licensing agency which may then "adopt" the proposed decision or,
9. after going through a series of prescribed steps, including notifi-
10. cation of the licensee, reach a decision different from that recommended
11. by the presiding officer. Ordinarily the licensing agency may reduce
12. the severity of the recommended action without any particular pro-
13. cedural steps since this favors the licensee and therefore cannot
14. deprive him of due process of law. If, however, the penalty is to
15. be more severe than that recommended, the licensee has to be so
16. advised and must be given an opportunity to object.

17. It is essential to all systems of adjudication that there be
18. at least one level of independent review of decisions affecting a
19. substantial legal right, such as the holding of a license to conduct
20. a day care center. Therefore, court review of the administrative
21. decision is either expressly provided for by law or permitted by
22. necessary implication.

23. When the decision to revoke becomes final -- and sometimes, to
24. the chagrin of those responsible for maintaining the standards of the

1. program this takes years -- the order must be enforced by compelling
2. the facility to close its doors. When necessary, the powers of the
3. police or the courts must be invoked to accomplish termination of
4. the formerly licensed activity.

5. E. Appeal to the Courts

6. State child day care licensing statutes tend to provide for an
7. appeal to the court following an administrative hearing on a revoca-
8. tion. Section 10 of the OCD Model Act reads:

9. Any final decision of the Department made by a hearing examiner after a hearing, or by the Director after an informal meeting and review of the available evidence, may be appealed by a party to the hearing or the informal meeting to the _____ Court for review (by commencement of a civil action) within _____ days after the mailing to the party of the notice of the decision. The review shall not consist of a trial de novo. The findings of the hearing examiner or the Director as to any fact, if supported by substantial evidence, shall be conclusive. The Court shall have power to enter judgment upon the pleadings and a certified transcript of the record which shall include the evidence upon which the findings and decision appealed are based.

10. Section 19 (h) of the 1975 Texas Child Care Act reads:

11. Within 30 days after receipt of the committee's decision, the person whose license has been denied or revoked may challenge the decision in suit filed in a district court of Travis County or the county in which the facility is located. The trial shall be de novo.

12. As a comparison of the above two sections indicates,
13. there is variation as to whether the case is tried de novo or "on the
14. record." As the OCD Model Act puts it: "The findings of the hearing

1. examiner or the Director as to any fact if supported by substantial
2. evidence shall be conclusive. The Court shall have power to enter
3. judgment upon the pleadings and a certified transcript of the record
4. which shall evaluate the evidence upon which the findings and decision
5. appealed are based."

6. There is probably a general advocacy of an "on the record"
7. approach. However, the deciding factors as to which approach should
8. be followed are the procedural soundness of the administrative hearing
9. generally and the professional competence of the hearing officers
10. specifically. The principle of equal protection and fairness to all
11. requires that a person have his day in a court competent to resolve
12. controversy in a procedurally proper manner. If the administrative
13. hearing meets this test, then there seems no need to burden the court
14. system with unnecessary duplication of fact determination. Where the
15. administrative hearing service does not move in the direction of
16. providing a proper parallel adjudicative service, then de novo trials
17. will probably be necessary and just.

18. A note should be made in respect to the doctrine of the legal
19. principle of "exhaustion of administrative remedies." The operational
20. implication of the doctrine put simply is this: the courts will not
21. entertain litigation until after an administrative hearing or some
22. other determination of the licensee's rights within the framework
23. of administrative law. The primary reasons for the doctrine are 1)
24. to take full advantage of the administrative expertness of the licensing
25. agency, and 2) to achieve greater uniformity of application of

1. laws.* The implementation of doctrine should contribute to the
2. development of the administrative hearing which provides a more
3. immediate and accessible adjudicatory services.

* See Frank E. Cooper, State Administrative Law, Volume Two, Chapter XVII, pp. 561-585, "Timing of the Application for Judicial Review."

VII. Structure for Enforcement

1. Structure is program destiny. The finished product, whether
2. it be a service or a material thing, is in the final analysis always
3. related to factors such as the administrative locale, the clustering
4. of functions, availability of staff, and their arrangement of one
5. to another in order to get the job done.

6. The structural aspects of enforcement for child day care licensing
7. standards will be commented on (within space limitations) in respect
8. to: administrative organization of licensing operations; personnel
9. administration aspects of enforcement; and the role of the federal
10. government in enforcement of state licensing standards.

11. A. Administrative Organization

12. Administrative organization for enforcement will be considered
13. in relation to 1) administrative location, 2) state-local relations
14. and, 3) integration of regulatory functions. These items will be
15. considered mainly from the viewpoint of enforcement implications.

16. 1. The administrative location of the responsibility for child
17. day care licensing, as stated earlier, may be a critical determinant
18. in successful enforcement operations. Certainly, when located in a
19. department possessing a poor community image and assumed to be con-
20. cerned mainly with problems of poverty and social pathology, child
21. day care licensing may well have problems of community understanding
22. and constituency support. Both of these are related to sound achieve-
23. ment in enforcement administration. Enforcement may often involve

1. publicity which a multi-function department would prefer to avoid
2. lest it upset the community attitude towards the department generally.
3. At present, there is apparently no broad sector of support for any
4. single preferred location for child day care licensing. More policy
5. planning is needed. Unfortunately it seems to be taken for granted
6. that wherever child day care has been located, however fortuitously,
7. that is where it has to be! Let sleeping dogs lie.
8. 2. Much of the administration of child day care licensing is
9. decentralized to regional offices possessing considerable operational
10. autonomy, or to local (usually county) government. The delegation of
11. licensing administration to local government may be provided for by
12. statute or may be an option statutorily authorized but implemented
13. by the state licensing agency. It is the position of this Statement
14. that decentralized administrative organization of child day care
15. licensing is not conducive to sound enforcement operations. Rather,
16. child day care licensing should be a centralized state administrative
17. responsibility. Sound enforcement administration requires equal
18. treatment and uniform practice. Generally speaking such enforcement
19. is best achieved through a "straight line administrative command."
20. Training costs and magnitude of communication operations alone make
21. any other approach unsound and untenable. Theoreticians who advocate
22. decentralized regional administration seem to fail to appreciate the
23. fundamental difference between licensing as a preventive activity,
24. community-centered, and service programs as a helping activity,

1. individually centered.^{*} The acceptance of a centralized licensing
2. operation, however, does not eliminate the feasibility of "housing"
3. licensing personnel in regional offices and encouraging such out-
4. stationed staff to become acquainted with, and appropriately involved
5. in, regional and local affairs.

6. Insofar as the licensing agency has other child day care regulatory
7. responsibilities, all of these should be administratively integrated
8. into a child day care regulatory operating unit. These other regu-
9. latory activities may include inspecting, reporting on, and even
10. giving approval (but not a license) to child day care facilities
11. under public administrative auspices. The responsibility may also
12. include the credentialing of child care-givers, the certification of
13. facilities holding themselves out as offering specialized services,
14. and the certification of facilities as eligible to receive payment out
15. of public funds. The responsibility may actually include fixing
16. the rates of payment for certain private child day care services pur-
17. chased by public agencies. All of these activities may be properly
18. classified as being regulatory in nature: standards are formulated,
19. individualized compliance tests are made; positive or negative sanc-
20. tions are supplied in the form of official approval or nonapproval.
21. Insofar as these activities are regulatory in nature, it follows
22. that there will be problems of positive and negative enforcement of
23. standards. Having them all administratively integrated into a single

* In the final analysis licensing must be seen as a manipulation of a given environment to reduce risks to children in that situation. Thus licensing, in effect, is a community organization operation rather than an individual or group treatment service program.

1. operating unit should facilitate achieving uniform practices and
2. equal treatment.

3. B. Personnel Aspects of Enforcement

4. Neglect of and indifference to the enforcement component of
5. licensing administration is manifest in the failure to deal effectively
6. with role definition of staff to perform enforcement functions. Ex-
7. perience would suggest that if a "new deal" in licensing standards
8. enforcement is to take place, consideration must be given to: 1) the
9. feasibility of a top management "enforcement officer," 2) the redefini-
10. tion of the role of the line licensing supervisor to include enforce-
11. ment activity, and 3) development of a new line licensing staff
12. position, the regulatory investigation specialist.

13. 1. There should be a top level position of "enforcement officer"
14. who would report to the director of the regulatory agency. This
15. enforcement officer would chair the agency's council on uniform prac-
16. tices.* The preferred qualifications for this position would combine
17. legal training with social work or child development experience and
18. education. The enforcement officer would have three primary responsi-
19. bilities: 1) to serve as consultant to personnel responsible for
20. directing or supervising line licensing workers who engage in positive
21. enforcement operations; 2) to assume responsibility conjointly with
22. line supervisors for directing licensing staff involved in negative
23. enforcement operations, and 3) to assume full responsibility for

* A council on uniform practices would be the primary structure for achieving an institutional decision making approach in regulatory administration.

1. directing personnel engaged in suppression of illegal operations. In
2. addition to being chairperson of the council on uniform practices,
3. he or she might serve as chairperson of an ad hoc planning committee
4. on enforcement which would be composed of both staff and community
5. persons.

6. 2. The role of the line supervisor needs to be defined or
7. redefined in respect to enforcement duties and responsibilities.
8. Among other duties, the line licensing supervisor should provide an
9. informal review service when a licensee and a line worker seem to
10. be at an impasse as to whether or not a given standard is met. This
11. review service may include going into the field (i.e., facility) to
12. make a separate or a joint inspection. The line licensing supervisor
13. also might play a greater part than at present in the reception
14. and investigation of complaints. Although it is advocated that "regular"
15. licensing workers generally not be involved in suppression of illegal
16. operations, when it is necessary that a line licensing worker make
17. such investigation, the supervisor might join the worker in the visit
18. to the facility. There is much to be said for a "joint" or "team"
19. visit in this type of situation. Finally, the supervisor should be
20. expected to play a greater role in "fair hearing" situations,
21. including the helping of the line worker to participate more effec-
22. tively in the hearing and serving as a link between line worker and
23. legal counsel.

24. 3. A new type of licensing role needs to be defined and developed
25. in respect to enforcement operations. This staff member would

1. specialize in the investigation of reported illegal operations and
2. join with the line licensing worker in negative enforcement of
3. standards activity, especially in relation to possible revocation.
4. A possible job title might be "special licensing investigator."
5. The enforcement officer (referred to above) would be generally
6. responsible for the direction and guidance of these special investi-
7. gators whether they were in the headquarters office or outstationed
8. in a regional office. Such workers would participate in a special
9. staff development program. With legal training, this experience
10. should be qualifying for assistant enforcement or enforcement officer.

11. In addition to the above enforcement personnel, we should also
12. recognize that if successful enforcement operations are to be carried
13. out, the licensing agency will need to have access to subject matter
14. specialists on child development. Two important functions of these
15. subject matter specialists would be: 1) to testify as experts at
16. hearings, and 2) to provide consultation to licensing staff when
17. revocation is being considered. The bases of employment might vary:
18. full time, part time, or fee basis, preferably the last except for
19. very large licensing agencies. Expert testimony in other areas
20. such as fire safety or building standards should preferably be
21. secured or obtained from officials in these particular fields. The
22. presence of a state interregulatory agency council might facilitate
23. bringing about this cooperative testifying service which is urgently
24. needed for sound enforcement operations.

1. C. The Role of the Federal Government in Standards Enforcement.

2. It is the position of this Statement that providing adequate
3. and proper child day care services is primarily an administrative
4. responsibility of state governments, a responsibility which assumably
5. will be shared with local governments and community groups. Like-
6. wise the basic regulatory safeguarding of child day care must be
7. seen as a primary responsibility of state government.* Making these
8. assertions, however, does not imply that the federal government
9. should not play a secondary or supportive role in achieving effective
10. and efficient enforcement of state regulatory standards for child
11. day care. These three things the federal government might do:

12. 1. The federal government can provide an intellectual leader-
13. ship in the improvement and refinement of enforcement administration.
14. This intellectual leadership would include sponsoring the preparation
15. of conceptual statements and policy position-taking papers based on
16. research relative to child day care regulation enforcement. At
17. this time we greatly need keen intellectual analysis of certain
18. enforcement problems somewhat unique to child day care regulation,
19. e.g., determining and establishing the credibility of the young child
20. as witness. Operationally, providing intellectual leadership would
21. also include the sponsoring of national and regional conferences
22. on enforcement problems, policies, and practices. Also included in
23. intellectual leadership operations would be the collection and reporting
24. of statistical data as it relates to enforcement aspects of child day

* This position is held both for constitutional and ideological reasons.

1. care regulation. Perhaps the serious neglect of the enforcement of
2. child care licensing standards generally can be explained by the
3. absence of proper statistical reporting of formal enforcement actions.
4. Social statistics do not provide social answers but they help increase
5. community awareness that problems exist. This community awareness is
6. an essential prerequisite for the planning and formulation of sound
7. public policy.
8. 2. The federal government should provide to state governments,
9. upon request, technical assistance relative to sound enforcement
10. administration in the field of child day care regulation. By tech-
11. nical assistance is meant "packaged" intelligence (i.e., meaningful
12. information), standardized operating procedure and operational models,
13. all of which might be selectively used in administrative decision-
14. making. The specific technical assistance supplied to a given state
15. would be determined by means of an individualized consultative service
16. furnished by a federal field staff. Specific technical assistance
17. would be supplemented generally through a system of federal communi-
18. cations relating to enforcement of regulatory standards for child
19. day care. An important means of communication would be a federal
20. newsletter relative to the enforcement of child care regulatory standards.
21. Such a newsletter would, among other items, include reports of the
22. formulation and presence of uniform laws relative to enforcement,
23. recently enacted state legislation of a significant nature, recent
24. court decisions and attorney general's opinions, accounts of inno-
25. vative operational approaches, professional literature citations and/or

1. abstracts, and a calendar of conferences, meetings and events related
2. to enforcement. The presence of such a newsletter should contribute
3. to the development of a professional collegiality of enforcement
4. personnel which is, at present, greatly lacking!
5. 3. The federal government should provide funds for what might
6. be termed incentive funding for operational expansion, refinement and
7. innovation in enforcement. The amount of federal money need not
8. necessarily be great and whatever is available should not be a "flat"
9. grant or "handout" to the state. There should be joint planning by
10. the federal and state governments and then grants or awards should be
11. reviewed by a separate advisory award board. The federal government
12. would be responsible for monitoring the operations in respect to
13. contract fulfillment and the dissemination of significant findings to
14. other states and communities, possibly in part through the newsletter.
15. Each federally funded project should have a built-in plan of appraisal.
16. This appraisal should be done by an "outside" review group and a
17. report of findings should be published as a follow-up of the approved
18. plan.

Whither FIDCR?

19. In concluding these comments on the role of the federal govern-
20. ment in the enforcement of state child day care licensing standards
21. and possibly other types of regulatory standards, this statement
22. is added in respect to the current issue: "Whither FIDCR?"

1. Prefatorily, it should be noted that thinking about and
2. analyzing the problems and processes of enforcement of state licensing
3. standards does not in itself warrant the assumption of expertise in
4. policy formulation for achieving and/or upgrading national minimal
5. standards of day care when public funding is present. FIDCR is not
6. a licensing program. From a classificatory point of view, FIDCR
7. might be regarded as a fiscal regulatory administrative program.
8. Standards are formulated; individual instances of operations are in-
9. spected for standards compliance; and, positive or negative sanctions
10. (economic, not legal) are administered. If compliance is not present,
11. payment involving federal funds is not, or should not, be made.

12. It has been stated that sound practices of regulatory admini-
13. stration have not always been followed in FIDCR. Some persons have
14. wondered about the standards (requirements) formulation process. (Was
15. there proper notice to concerned persons, and were there adequate
16. "hearings" in the formulation of the standards?) Next, claims of
17. faulty or inadequate inspection have been made. Lastly, some hold
18. that there was insufficient "negative enforcement" relative to
19. terminating payments when compliance was not present and taking the
20. immediate steps necessary for reimbursement to the federal government.
21. Even assuming the allegations are true, they do not in themselves
22. constitute a basis for saying the FIDCR idea is necessarily wrong or
23. inappropriate. What is said is simply that the regulatory administra-
24. tive aspects were not properly dealt with. If there is continuance of
25. FIDCR as is, or modified, it is most important that the past regulatory

1. administration be recognized as faulty and that in future operations
2. the faultiness not be present. We believe greater conceptual clarity
3. in respect to licensing standards enforcement may contribute --
4. tangentially -- to improved enforcement of FIDCR in giving a better
5. sense of operational directions to enforcement operation.

6. The authors of this Statement question, for whatever the question-
7. ing may be worth, whether FIDCR is the best, most appropriate, long-
8. run policy in order to achieve and upgrade national minimal day care
9. standards. They do not necessarily question the feasibility of FIDCR
10. as a short-run program if it is premised on sound principles of fiscal
11. regulatory administration.

12. The authors of this Statement believe, however, that the critical
13. determinant in the successful administration of any FIDCR-type
14. program is the presence of a well developed system of state regula-
15. tory agencies for child day care, effectively, efficiently and economi-
16. cally operated. The state regulatory agencies must be well based
17. statutorily, adequately staffed, and administratively committed to
18. formulating enforceable standards. In addition, high-quality,
19. reliable investigatory operations and wholesomely vigorous and
20. equitable enforcement must be present. Without all these features,
21. child day care licensing becomes merely a ritual -- a mockery of
22. safeguarding operations.

23. To be sure, the presence of a sound system of state day care
24. licensing agencies will not necessarily assure -- in itself --

1. success for a new, or modified, FIDCR-like program. But without
2. such a system of state regulatory agencies no program such as FIDCR
3. would seem likely to succeed. Sine qua non.

Appendices

Appendix I. Some Enumerative Comments on the Enforcement Provisions of the Office of Child Development Model State Day Licensing Act by Walter Wadlington, Professor, University of Virginia Law School.

Appendix II. The Relationship of the Virginia Child Day Care Licensing Agency and the Office of the Attorney General by Margaret Miller, Director, Division of Licensing Division, Virginia Department of Welfare and John Rupp, Assistant Attorney General, Office of the Attorney General, Commonwealth of Virginia.

Appendix III. The Suppression of Illegal Child Day Care Operations in Vermont by Rolland Gerhart, Jr., Director of the Vermont Office of Child Development and Georgiana O. Miranda, Chief, Human Services Division, Office of Attorney General, State of Vermont.

Appendix IV. The Model State Administrative Procedure Act with an Introductory Note by Rudolf H. Michaels, Administrative Law Judge, California Office of Administrative Hearings.

APPENDIX I.

Some Enumerative Comments on the Enforcement Provisions of the Office of Child Development Model State Day Care Licensing Act by Walter Wadlington, Professor, University of Virginia Law School.

The OCD Model State Day Care Licensing Act (hereinafter referred to as The Model Act) was drafted for the purpose of providing a ready model for individual state legislative enactment at a time when substantial increases both in the need for day care services and the availability of governmental support for day care were considered imminent. Although the Model Act was designed as a legislative "package" which might be adopted in its entirety, subject to minor changes necessary to conform with local law and administrative organization and practice, it was also anticipated that some states might consider adoption of individual parts of the package or might look to it for helpful legislative language, definitions and ideas which could serve as the starting point for revision of existing laws.

The Model Act is fairly short, containing a statement of purpose and thirteen sections (one of which merely sets forth the title). An initial statement explains the goals of the act and the purpose of day care licensing generally. This opening statement is followed by a series of definitions which carefully delineate the various categories of day care operations which need to be distinguished under the regulatory scheme, and explain certain "terms of art" related to types of licenses and the licensing process. The Act then provides for the development and promulgation of rules and standards for initial

and continuing approval and control of day care operations through the granting, withholding, suspending, or revoking of licenses.* In addition, among its features is a mechanism for participation by operators, users, and child specialists in the policy formulation area of the licensure process.

Some persons involved in the original OCD project which sought to develop a group of general regulatory models felt that the legislative product should have been substantially more inclusive and detailed than the Model Act which emerged, spelling out specific items and numbers in matters such as program and staffing requirements. The drafters, on the other hand, felt that the role of the Model Act was to carefully outline the scope of regulatory authority which would be delegated to the appropriate administrative agency; further, the act was designed to effect such delegation, to define the entities and activities which would be covered by regulation, and to provide a fair and effective means for enforcement of day care licensure and regulation. Such licensure and regulation should be undertaken in accordance with the purposes of the Act and consonant with the delegation of power set forth within it.

In short, the Model Act was an attempt to clearly establish the scope of regulation and thus to minimize the lack of clarity which all too often had been characteristic of day care regulation both

* In jurisdictions which have an administrative procedure act (see Appendix IV) provisions concerning the adjudication of hearings stemming from denial or revocation would likely be governed by the general law and in lieu of spelling out the process in the licensing law, reference would be made to governing general statutes.

from the standpoint of the regulating agency and those it sought to regulate. In addition, the Act would provide an enforcement mechanism which would adequately safeguard the needs of children in day care while protecting the rights of applicants for licenses and licensees in accord with the notions of fundamental fairness developed judicially over the years to meet constitutional guarantees of due process of law.

This appendix note will focus on the Model Act's treatment of the licensing process and its enforcement mechanism. It will be organized in four parts: 1) initial grant or denial of a license; 2) renewal and nonrenewal; 3) suspension, probation and revocation; and 4) suppression of illegal operations.

The Model Act makes a distinction between "licensure" and "approval," the latter being the term applied with regard to day care facilities operated by a government instrumentality. No separate discussion of the "approval" process in this technical sense of the word will be contained in this note; the basic requirements for granting or denying such "approval" are substantially the same as those for licensure except that Section 7,(1) relating to misdemeanor punishment for not having official permission to operate, applies only to non-governmental facilities.

I. THE INITIAL GRANT OR DENIAL OF A LICENSE.

Section 3c of the Model Act requires an application for a license on forms supplied by the licensing agency and "in the manner it prescribes." This directive permits the agency to request the key

information it needs and assures uniformity in this regard. Before a license can be issued, Section 3d requires the agency "to conduct an investigation of the applicant and the proposed plan of care for children and for operating a day care facility . . ." If the results of the investigation show that applicable rules and regulations are satisfied, a license will be issued at that point. Section 8 of the Act provides that such a regular license shall expire one year from the date of issuance, and each license certificate must clearly state the kind of program which the licensee can undertake and the number of children who may be served, among other items.

If the licensing agency finds that "all of the applicable rules and regulations cannot be met immediately but can and will be met within six months or less, and the deviations do not threaten the health or safety of the children, then a provisional license . . . shall be issued for a period not to exceed six months . . ." In the definitional part of the Act (Section 2), the difference between a "License" and a "Provisional License" is made clear. The former is "a complete and unconditional" authorization to operate (in accordance, of course, with the provisions of the individual license and the general rules and regulations). A Provisional License can only be issued to the operator of a facility who is "temporarily unable" to comply with all of the licensing requirements. Use of the Provisional License has been limited to six months to avoid the prospect of a series of regularly renewable provisional licenses. By definition in Section 2p, it is also restricted to the operator of a new facility.

Failure of the licensing agency to act on an application for a license within 90 days is deemed to be a denial from which an appeal can be taken under the procedure set forth in the following part.

A. Notification of and appeal from denial of a license.

Section 4 of the Model Act provides the mechanism for appeal from denial of a license. While Section 3 states the conditions under which a license shall be granted, Section 4 provides that if a license is denied the applicant "shall be given written notice" by certified or registered mail. The notice must state the reasons for denial and advise the applicant of his/her appeal rights. Any appeal must be filed in writing within 30 days from the date when the denial was mailed.

When notice of appeal has been timely filed, the applicant is entitled to a prompt hearing before an impartial hearing examiner. It is the examiner who then makes the final decision whether the applicant should be granted or denied a license (regular or provisional). Section 5 of the Act provides that the applicant may be represented by counsel at the hearing and may call, examine, and cross-examine witnesses. The hearing examiner is given subpoena power to compel the presence of witnesses on behalf of either the applicant/appellant or the licensing agency. The decision of the examiner must be in writing, and a copy must be sent to all parties to the proceeding by registered mail.

Any final decision of a hearing examiner is subject to further appeal through a civil action in the designated court. Significantly, however, such a judicial review does not amount to a trial de novo

which would require a repetition of the evidentiary, or fact finding, part of the hearing. If supported by substantial evidence, the hearing examiner's findings of fact will be conclusive. The reviewing court's role is to determine whether the correct legal rule has been appropriately applied. In so determining, the reviewing court may enter a judgment upon the pleadings and a certified transcript of the record from the hearing which must include evidence on which the findings and decision were based.

II. RENEWAL AND NONRENEWAL.

Section 8 of the Model Act, as noted previously, provides that a license will expire one year after its issuance. (If a license was issued immediately following expiration of a provisional license, "the expiration of the license . . . shall be one year from the date of the expiration of the original license. . .") As to renewal, Section 9 states simply that: "licenses . . . may be renewed upon application and approval." Unfortunately, the Act does not set forth any particular application and renewal process.

While there may possibly be some confusion whether a special investigation must take place after a renewal application under the language of the Model Act, it seems doubtful that this is mandated by the legislative language. Section 4 of the Act speaks to investigations before "issuing" a license, while Section 8 speaks in terms of "renewal" rather than "issuance." Section 9, however, states that in exercising the powers of "licensing, approving, renewing, suspending, revoking, or making (licenses) probationary," the agency "shall

investigate and inspect licensees . . . and applicants for a license . . ."

Section 9, it should be noted is the basic provision dealing with the power to make inspections. It is the section which requires cooperation with investigations and access to the applicant's or licensee's facilities, records, and staff.

Given the short duration of the license period, a feature for which the Model Act may easily be criticized, it seems unlikely that a special renewal investigation of any major scope (say, one approaching the scope of that required when the license was issued) is mandated. On the other hand, the Act seems clearly to envision some process of ongoing inspection as part of the licensure and renewal process. It would have been helpful had the act contained more specific language concerning the agency's authorization to develop more specific rules and regulations concerning renewals; as the Act presently stands, however, such authority would seem to be implicit under the general delegation of regulation making power "for the operation and maintenance of day care facilities," as provided in Section 6.

A. Appeal from nonrenewal.

Section 4 of the Model Act, already discussed, deals with appeal from denial of a license to an applicant. Since the operator must apply for a renewal, it would seem that denial of a renewal application should trigger the same process mentioned in connection with denial of an application by an initial applicant. In any event, Section 10 of the Act provides for judicial review not only of a final decision of a hearing examiner, but of "Any final decision of

the Department . . . made by the Director after an informal meeting and review of the available evidence . . . "

B. Renewal: A Closing Criticism.

Based on the lack of clarity in the treatment of the renewal process, plus the short time duration for a license before renewal, evidently it was expected that renewals would be issued almost as a matter of course and that the regular, ongoing inspection process would satisfy the requirement of establishing conformity with rules and regulations so as to justify renewal. This approach probably conforms to what has been happening in practice. Whether it is the most desirable approach (or even close to it) is dubious at best. Seemingly the Act should clearly provide either for a longer duration of the license with periodic inspections or a substantial review on application for renewal, or else the near automatic nature of the renewal process should be spelled out. (Furthermore, if it is to be left to administrative rule making, the statute should be clearer in this respect.) Another alternative would be to provide that as long as a given operation continues, the operator's license continues to be valid until it is revoked, suspended, or made probationary according to the process which will be discussed next.

III. SUSPENSION, PROBATION, AND REVOCATION.

Section 5 of the Model Act gives the licensing agency power to suspend, revoke, or make a license probationary in cases where the operator is found to be out of compliance with the rules and regulations.

The agency is charged with the duty and delegated the power to develop and promulgate rules and regulations dealing with such actions. Thus the Act itself does not elaborate on the different situations in which one measure should be used in place of another. Obviously, however, the three alternatives can be considered as differing in the degree of severity in the sense that one permits continuing operation, one interrupts operation but does not necessarily terminate it, while the third effectively terminates operation. It should be noted that the sanctions are applicable to both provisional and regular licensees.

In developing rules and regulations for carrying out this part of the enforcement process, the agency is instructed to consult with other persons and governmental units which have an interest, including such departments as Health, Education, and Welfare, the Fire Marshall, and the Attorney General; parents of children in day care; child advocacy groups, the Advisory Committee established under the Model Act; representatives of the day care center; and experts in professional fields relevant to child development. The delegating language spells out the areas which such regulations may cover; for example, Section 6b states that the purpose of the rules and regulations is:

to promote the health, safety and welfare of the children who are to be served by assuring safe and adequate physical surroundings and healthful food; by assuring supervision and care of the children by capable, qualified personnel of sufficient number; by assuring an adequate program of activities and services to enhance the development of each child; and by encouraging parental participation.

The rules and regulations, which must be published so as to be readily available to the public and must be the subject of periodic reviews,

are to be designed "to promote the proper and efficient processing of matters within the cognizance of the Department and to assure applicants, licensees and approved operators fair and expeditious treatment under the law."

Careful mention is made of the rule making delegation and function because these factors are considered keys to effective enforcement through the sanctions provided within the Act. Both the scope of permissible rule making and the goals it should achieve have been carefully elaborated.

The procedure for suspending, revoking, or making a license probationary is set forth in the Model Act; it is basically the same for all three actions. Notice first must be given by certified or registered mail. It must state the reason for the proposed action and inform the operator of his/her right to appeal within 10 days of the notice of mailing. If an appeal is timely filed, it will be heard by a hearing examiner who has the same basic powers and function as would be the case in an appeal from a denial of an application, discussed earlier in part I of this note.

If the agency finds that "the health or safety of the children so requires," an immediate suspension may be ordered. Again, the operator has a right to appeal and to a prompt hearing before the hearing examiner.

Appeal from the action of the hearing examiner is governed by the same rules which apply to the process for denial of an initial application. If the examiner's decision was based on substantial evidence, the appeal is on matters of law and there will not be a

de novo hearing in court.

Availability of the twin tools of suspension and probation should give the licensing agency greater flexibility in its enforcement operations. Revocation is a peremptory action which most parties wish to avoid if possible. It is also harder to achieve, from a practical standpoint, because the burden of proof is generally considered to be fairly high. Probation, which can avoid putting the operator out of business even temporarily, serves to put one on notice of deficiencies which must be remedied within a reasonable time. It also establishes a past record of noncompliance; cumulative conduct justifying suspension, revocation, or possible injunctive action (to be discussed in the next section) is more easily established when such a course of administrative warning is followed.

Because of the nature of the administrative and judicial process, a suspension or revocation action can be expected to take time. However, the availability of extraordinary remedies such as immediate suspension, and possibly injunction, in instances in which the health or safety of children is threatened seems to provide adequate safeguarding machinery for the agency.

IV. SUPPRESSION OF ILLEGAL OPERATIONS.

The key to suppression of illegal operations under the Model Act is Section 7, which makes it a misdemeanor (a lesser criminal offense) to operate a day care facility or system without a license. The Act does not set forth the specific severity of the criminal sanction (such as a fine or imprisonment) but leaves this decision to

the discretion of the legislatures of the adopting states.

Along with the criminal penalty, the Model Act specifically provides that the licensing agency can seek an injunction against continuing operation of a day care facility or system in two important instances. The first is when there is a violation of the Act or of the agency's rules and regulations "which threatens serious harm" to children in the facility. The second is when a licensee has repeatedly violated the Act or the regulations. While the first of these is readily understandable as an emergency measure in keeping with the basic goal of safeguarding children, the second perhaps deserves some further explanation. If a licensee is not in compliance with the Act or the rules and regulations promulgated under it, then the license itself can be suspended or revoked (as already explained). This is a process which may require substantial time, however, and it is probably viewed by many as requiring a showing of some present, flagrant violation. What about the operator who has had a continuing pattern of violations which, when viewed cumulatively, shows such a disregard for regulation as to raise the question whether conformity with the regulations can be expected in the absence of massive or at least very close and continuous inspection or surveillance? Such an operator would seem to fit within the second category for invoking any injunctive remedy.

Most importantly, it would seem that the authority to seek an injunction against the repeating violator is complementary to the suspension/revocation mechanism. The injunction is in law sometimes termed an extraordinary remedy; it provides a method whereby the

licensing agency can act quickly to ask a court to effectively close down an operation, either temporarily or indefinitely. The availability of this tool may provide the licensing agency with an in terrorem weapon against the shoddy, marginal operator as well as a means for forcing the habitual offender to toe the mark in the future or otherwise close down day care operations.

As a procedural note, it should be pointed out that the Model Act contains several bracketed options concerning the appropriate legal official to seek an injunction in court. This question of choice is addressed to the general representation of the licensing agency in enforcement matters which reach the courts; should it be through the state attorney general's office or the attorney for the local governmental unit? Where the licensing function is carried out through a central agency, the matter of representation generally has been worked out in the state's administrative organization. It would seem of prime concern that the agency be represented by someone with expertise in the area of child day care. Positing this aspect of the enforcement function in many different county or district attorneys could make for the problem of lack of even a single expert to handle such cases. Perhaps the best arrangement would be for an attorney with special expertise (probably based in the office of the state attorney general) to work with local government counsel in such matters. This arrangement would combine specialized expertise with an understanding of local practice, and it would on occasion be important in securing community support of a nonlegal nature.

The Model Act does not specifically mention injunctions against operators who have not obtained licenses or whose licenses have been revoked, although their continued operation of a day care facility has been made a criminal offense. Without having to rely on the general injunctive powers of the court (a possible avenue nevertheless), the agency could seek an injunction under the first of the two categories mentioned in the statute in many, if not most, cases. Operating without a license is itself a violation of the Model Act. The other qualification for seeking an injunction under Section 7 (1), that there be threat of serious harm to the children, however, would still have to be met.

APPENDIX II.

The Relationship of the Virginia Child Day Care Licensing Agency and the Office of the Attorney General by Margaret Miller, Director, Division of Licensing, Virginia Department of Welfare and John Rupp, Assistant Attorney General, Office of the Attorney General, Commonwealth of Virginia.

The Virginia Department of Welfare consists of five separate divisions which provide the framework for implementing its statutory duties and obligations. One of those divisions is the Division of Licensing and it is through this Division that the Department's legal mandate to license and regulate child day care facilities is carried out. In carrying out those administrative and regulatory duties, the Division of Licensing has been able to develop an effective working relationship with the Office of the Attorney General which will now be explained.

I. Current Arrangement for Legal Representation Of the Department of Welfare By the Office of the Attorney General

Prior to the taking of office by Virginia's current Attorney General, a large part of the legal service provided to the Department of Welfare was by private counsel on a contractual basis. After assuming office in 1970, the current Attorney General gradually enlarged his staff so that he had enough assistants to provide legal representation to all of the various State commissions, agencies, and departments, including the Welfare Department. The current Director

of the Division of Licensing, who has been responsible for licensing for some years, recognized the need for legal counsel in fulfilling the duties of her position and expressed a desire for more help from the various Assistant Attorneys General who have been assigned to the Department. A close working relationship subsequently developed between the Licensing Division and the Attorney General's office which has been ongoing to this day.

The Department of Welfare opened seven regional offices throughout the State in the early 1970's and many of the licensing responsibilities were eventually assigned to personnel in these regional offices. The Office of the Attorney General was subsequently given funds to provide for seven Special Assistant Attorneys General who were located thereafter in each of the regional welfare offices. These Special Assistants were to provide legal advice and assistance for all of the programs operated by the Welfare Department, including licensing. Later, a position of second Assistant Attorney General was established in Richmond.

Therefore, the current arrangement has two Assistant Attorneys General in Richmond assigned to represent the State Department of Welfare and a Special Assistant Attorney General located in each of the seven regional welfare offices. This arrangement enables all licensing personnel to have close access to legal counsel.

II. Administration of Day Care Licensing Within the Department of Welfare

The licensing of child day care in Virginia is one of the responsibilities of a multi-functioned Division of Licensing, with the Division Director being directly responsible to the Commissioner of the State Department of Welfare. The licensure of day care facilities, including both family day care homes and child care centers, is enmeshed within a total responsibility for licensure and regulation of child caring institutions, independent foster homes, group homes, child placing agencies, (domiciliary) homes for adults, and day care centers for adults. The central office of the Division of Licensing is located in Richmond and houses top administrative personnel and various assistants who specialize in supportive or administrative aspects of the program. Each of the seven regional welfare offices contains a licensing unit consisting of a supervisor (who may serve either one or two regions) and a staff of licensing specialists. The specialists are divided functionally into child and adult licensure.

Operationally, all licensing activities take place in the regions with the exception of licensure of child placing agencies, which remains centralized. However, the authority for negative actions, revocation, and denials, the authority to proceed in any litigation, and the final authority for all administrative hearing procedures are handled in the central office. Thus, authority for negative sanctions and court actions to seek enforcement is a centralized authority close to the Commissioner. Thus, operationally, the application taking, study, recommendation, and approval of day care licenses, and the giving of

consultation to licensees are in seven regional offices. The central office then carries responsibility for standards formulation, manual, policy, staff development, negative enforcement, monitoring, and evaluation of regional licensing programs; in addition, the central office renders technical assistance to regional licensing operations including corrective actions in carrying out licensing procedures.

III. Statutory Grounds for Enforcement

The Department's licensing responsibilities for all types of facilities, including day care facilities, are found in Chapters 9 and 10 of Title 63.1 of the Code of Virginia (1950), as amended. Pursuant to those chapters, the Division of Licensing has established different sets of licensing standards for the various types of facilities it must regulate. Once the standards are met, the Commissioner then issues a license to the facility.

In order to regulate these facilities, the Department generally has the right to inspect the facilities both prior and subsequent to its being licensed. Inspections may be announced or unannounced.

63.1-210. Inspections and interviews. The Commissioner, the State Board, and their agents, shall have the right, at all reasonable times, to inspect all of the facilities, books and records of every child welfare agency, and to interview any agent or employee thereof or any person under its custody, control, direction or supervision. Such agents shall afford the Commissioner, the State Board and their agents every reasonable opportunity and facility for such inspections and interviews.

Pursuant to the above stated chapters, the Commissioner may deny an application or revoke or refuse to renew a license if the facility

fails to comply with the limitations set forth in those chapters or with the standards developed by the Division of Licensing and approved by the State Board of Welfare. The applicant or licensee can appeal an adverse decision through the State's Administrative Process Act which provides for an administrative hearing. Since that Act is not entirely cogent, the Assistant Attorneys General have developed detailed departmental guidelines to clarify and implement it. Title 63.1 of the Code also makes provision for injunctive relief or for criminal prosecution against facilities operating without a license.

IV. Pre-Revocation Activity

The licensing specialist may become aware of noncompliance with standards in one of two ways. A third party may make a complaint of failure of a day care facility to comply with certain standards, or at the time of a supervisory visit, nonconformity may be noted or observed. In the first instance, the complaint must be reduced to noncompliance with specific standards and its validity established. The licensee is then confronted with specific items of nonconformity. The licensee is encouraged to correct the deficiencies, but such rectification needs to be accomplished within a definite time limit. The licensing specialist's attitude is one of encouraging the licensee to conform with requirements. At the end of the time period established for meeting the items of deficiency, a return visit is made to the facility and the specified evidence of noncompliance is reconfirmed, if necessary, and additional evidence, if possible, is secured. The same procedure is followed when the lack of conformity is discovered

by the licensing specialist except that there is no prior complaint to be validated. At some phase of the above procedure, the licensing specialist may engage in one or more of the following operations: discuss the case with the regional licensing supervisor, alert the central office coordinator to the possibility of revocation and/or request technical assistance from the central office.

V. The Revocation Process

Where efforts to attain compliance appear to have failed, a decision is usually made by the licensing specialist or his or her supervisor to involve the Attorney General's office. Since this action usually occurs in a regional office, one of the seven Special Assistant Attorneys General is then consulted for advice. The licensing staff has immediate access to the Special Assistant since he is physically located in the same office. This arrangement has proven to be extremely valuable since the Special Assistant can both give advice on how to prepare the proper groundwork for a revocation and assure that all other possible ramifications are considered.

In any negative action, institutional decision-making occurs through involvement of the following staff: Regional licensing specialist, regional licensing supervisor, Special Assistant Attorney General, central office coordinator, central office bureau chief, Director, Division of Licensing, Assistant Attorney General and, in some cases, the Commissioner.

The licensee is put on notice by a letter enumerating the items of nonconformity when they are first established by the licensing specialist. As the case progresses toward revocation, the official

letter of intent to revoke is forwarded by the Director of the Division of Licensing. This letter follows a format developed by the Assistant Attorney General and his Special Assistants which is incorporated in the licensing procedures developed to implement the Administrative Process Act. The letter will explain what action is being taken, the reasons for such actions, and tell how the decision can be appealed. This letter states that the license will be revoked within 30 days from the date received unless the licensee indicates his desire for an administrative hearing within 15 days. The 30 days allows time for other plans to be made for children under care.

If the licensee exerts his right to an administrative hearing, the procedures for such a hearing have been developed by the Assistant Attorney General and his Special Assistants with the secretary of the Director of the Division of Licensing serving as the coordinator for such hearings. It is her duty to secure a hearing officer from an approved list of attorneys maintained by another State regulatory agency (Department of Professional and Occupational Regulation); in addition, she handles correspondence concerning the date and location of the hearing, prepares various procedural documents for the hearing such as notice, continuances of the hearings (if needed), subpoena requests, and final hearing orders. She also maintains the official case record in the central office. One of the Special Assistant Attorneys General represents the Department at the administrative hearing. He accumulates and reviews the evidence and prepares the licensing specialist to give testimony. After the hearing, the hearing officer then makes a final recommendation to the Commissioner.

If a final order of revocation is issued, it is in a format developed by the attorneys, and the order is then signed by the Commissioner. This order allows 30 days for the revocation to become final. Throughout this process, there is consultation and interaction between the members of the Attorney General's office in Richmond and the regional office and between the Division of Licensing and the regional licensing staff.

VI. Denial or Refusal to Renew

The above procedures are substantially the same in a denial or a refusal to renew application. The major difference between a denial and a renewal is the consideration of the impact of the denial of renewal on the care of children in the facility. In either a revocation or denial of a renewal application, the approach by the licensing worker is that of exhausting every effort to encourage and assist the operator to conform before proceeding with negative sanctions. Concern regarding the children is implemented through alerting the responsible agency or agencies to the impending action with emphasis on the synchronization of planning for the removal of the children with the denial or revocation. Coordination with the placing agency is facilitated by the fact that the licensing specialist may enlist the cooperation of the regional service specialist who is a member of the same regional staff and who carries responsibility for work directly with local public agencies engaged in the placement of children in licensed day care facilities. If the responsibility of planning rests with the parents, the licensee is advised

by the licensing specialist of resources to which they may be directed for other placement.

In Virginia, however, the State statutes also provide for provisional licenses to be issued for up to six months if the applicant is temporarily unable to comply with standards. In addition, a provisional license is renewable for up to two successive years, which allows leeway for some facilities to come later into full compliance with the required standards.

VII. Suppression of Illegal Operations

Suppression is achieved either through the use of the injunction or by referral to the local Commonwealth Attorney for criminal prosecution. If it is the latter, the Special Assistant Attorney General will accompany the licensing staff where the referral is made.

When seeking injunctive relief, close cooperation exists between legal and licensing staffs so that proper pleadings are prepared and eventually signed by the Commissioner of the Department.

VIII. Relationship with Attorney General's Office

The easy access and availability of the Special Assistant Attorney General to the licensing specialist and availability of the Assistant Attorney General to the central office staff are keys to the success of the proceedings in revocation, denial and other enforcement actions. The fact that legal advice is readily available to the line worker (licensing specialist) cannot be overlooked as an

important element in the success of such operations. The evidence is evaluated and the attorney gives advice as to how to proceed, whether additional evidence is needed, suggestions as to how it can be secured, what evidence is admissible, etc. When necessary and appropriate, the Special Assistant Attorney General may decide to accompany the licensing specialist on a visit to the facility, thus gaining firsthand knowledge of the violations. The attorneys have demonstrated a keen interest in licensing, feeling that licensing is the "most legal" of welfare functions with which they deal. The line workers' confidence in enforcement operations is boosted by the attorneys' interest and counsel.

APPENDIX III.

The Suppression of Illegal Child Day Care Operations in Vermont
by Rolland Gerhart, Jr., Director of the Vermont Office of Child
Development and Georgiana O. Miranda, Chief, Human Services Division,
Office of the Attorney General of the State of Vermont.

Note: The actions of the licensing agency in the suppression of illegal operations must conform to, and be supported by, the law and the practice of law. The practice of law must be understood and carefully considered by the licensing agency in all its actions against an illegal operation. Because the practice of law is an art and not always or entirely reducible to a rigid or absolute set of steps, this brief statement, therefore, must be seen as a way of dealing with the suppression of illegal operations in principle only. This statement sets forth a procedure which satisfies the basic requirements of the present circumstances of Vermont's legal requirements and the resources of the child day care licensing agency. This statement represents the experiences, conceptualizations and opinions of the Director of the Vermont Office of Child Development and the office's legal counsel, the Chief of the Human Services Division, Office of the Attorney General, State of Vermont.

RG and GOM

The licensing agency's administrator can prescribe and implement successful agency policies and procedures to deal with the suppression of illegal operations. Successful operation requires: management of the resources of the agency, a thorough understanding of due process, an understanding of the differences between criminal and civil actions, and an official willingness to suppress illegal operations. Essential to the success of the agency are the services of an experienced attorney interested in and knowledgeable about, licensing and

suppression of illegal operations. Agency line staff must receive special training in, and be required to pay particular attention to, the role they play in the collection and documentation of information about illegal operations. Staff attitude toward the suppression of illegal operations must be compatible with the agency's policy. Special training, carefully and deliberately aimed at developing and maintaining such an attitude, is essential to bring all the staff resources into use toward successfully suppressing illegal operations.

The operation of a day care facility without a legally required license is a crime. The designation of criminal status is reserved by the Office of Child Development's Model State Day Care Licensing Act, Section 7, and state licensing laws to the operation of day care facilities which are subject to the licensing law of the state but which, nevertheless, operate without the official permission of the state. A review of other sections of the Model Act and state laws shows that criminal status and criminal punishment are never applied to any actions taken by the licensing agency related to a licensed facility, including such severe actions as revocation or suspension.

Some state day care licensing laws provide, as in the Model State Day Care Licensing Act, Section 7, that the licensing agency has the right to seek a civil law injunction action against the continued operation of a facility without a license, in addition to its right to bring a criminal action.

The civil injunction procedure against the continued operation of an illegal day care facility is compatible with the criminal action and is often essential to immediately close an illegal operation.

This action is more easily accomplished when the illegal operation clearly meets the criteria for a civil injunction which generally requires that immediate, irreparable injury, loss or damage will result in addition to the continued operation outside the law. In the case of a day care operation, danger to the life and security of the child is usually a primary consideration. Without injunctive relief, a life-threatening facility might continue to operate until found guilty in court of the criminal charge. Civil injunctions help the licensing agency suppress illegal operations by providing an alternative or additional viable legal means to close down illegal operations. One must be prepared, however, to prove the case on the civil level almost immediately, as the court may require acceleration of the trial to the date of the injunction hearing, particularly when the day care operator alleges prospective loss of income from the injunction.

The procedure for the suppression of illegal operations begins with a declaration that it is the policy of the licensing agency to be interested in receiving information about alleged illegal operations from the public, coupled with a statement supporting the reasonableness of cooperation with the agency. In addition, the agency policy includes its own efforts to discover illegal operations. In building public support and cooperation in the suppression of illegal operations, it is necessary to assure the public that the informant's request for confidentiality will be honored and that there will be dispatch by the agency in dealing with the alleged illegal operation. In order to effect public support, the agency

must supply no less than the following information: 1) the name, address, and telephone number of the agency to be contacted re: the suppression of illegal operation, 2) the statutory authority of the licensing agency to deal with illegal operations, 3) the possible penalties or consequences of illegal day care facilities. Information about the possible penalties or consequences of illegal operators is important as it sets the tone of the State's concern about illegal operations as well as serves as a qualifying reference to the would-be informant, prompting both sincere and accurate reporting.

Although the licensing agency cannot offer the informant specific information about the particulars of its investigation or its actions against an illegal operation, the agency will, if requested, give the informant a general statement as to the nature of the action taken. For example: in the case of a cooperating illegal operation a report that the problem was resolved by compliance to the law and day care licensing regulations, or in the case of a noncooperating illegal operation, a report that the operation has been referred to the state prosecutor, would be made to the informant. This response to the informant reinforces the agency's dependence on public support for its work and the agency's appreciation of the public's participation in the suppression of illegal operations.

Public cooperation is more easily established when the agency's policy toward illegal operations is first aimed at bringing illegal operations in compliance with the law and licensing regulations.

A considerable amount of information about an illegal operation is gathered by the agency for decision making. The minimum information

needed for consideration includes: the date the report of the illegal operation was received, how and from whom the information was received, whether the informant requested confidentiality, the alleged evidence of the illegal operation, including the identification of the facility, the name of the owner or operator, the days and hours of operation, the numbers and ages of children in care, the names of the children or families using the facility, the fees charged, if any, and possible reasons for making the report. The basis for reporting may be important to the agency in avoiding involvement in harassment or a personal vendetta. The management of this information requires organization for clear and orderly consideration. This is facilitated and accomplished by the use of a form especially designed to accommodate the information and its intended use.

On completion of this information form, a search of the licensing records, both active and closed, is made to avoid erroneous investigation of: an already licensed facility, an applicant in the process of licensing, or investigating without the benefit of other knowledge the agency may have, including the history of past applications or licenses, or previous legal actions against the operation in question.

The director of the agency receives the completed form and the benefit of whatever other information the agency may have and determines whether or not an investigation will follow. Once an investigation is ordered, the investigation is assigned to a staff person who serves the geographical area in which the alleged illegal operation is located. The staff's responsibility is to contact the alleged violator, complainant, and other reliable sources of information, by

phone, or in person if phone contact is not possible, to determine if the information received is substantially correct. If the information confirms that the day care operation requires a license, the operator is given information about the law, the licensing agency, and the need to be licensed. The operator is told that a letter will follow explaining the need for and benefit of licensing, the agency's willingness to be of assistance in explaining the application process, and the necessity for applying promptly for a license or taking other positive actions. No bargaining or negotiation is permitted during this first contact. It is an advisory contact aimed at giving the operator information about the coverage of the law, the need for a license to operate, the willingness of the agency to entertain an application for a license and the need for prompt, positive action on their part. The operator is frankly told that there is no legal provision for the continuation of the day care facility's operation without a license except under the exemptions provided in the law. The exemptions are enumerated.

Following the first, or advisory contact, a letter is sent to the operator covering the information given orally during the initial contact. The letter includes excerpts from the licensing statute and the Day Care Licensing Regulations. The letter requests a thorough reading of these regulations. An application is enclosed and attention is directed toward completing and returning the application promptly (within 5 days). If the operator does not intend to file an application, the operator is requested to write the agency stating that no application will be filed and the day care service will be closed,

or will operate only within the terms of the law's exemptions. Assistance is offered in understanding the law, regulations, and the completion of the application. The letter states the agency's readiness to resolve problems of cooperation without a license by granting a license if the day care facility applies for and meets the criteria for licensing. A warning is given as to illegal operations, and a brief citing of the section of the law dealing with the penalty for operating a day care facility without a license is included. The present Vermont Statute, 33 V.S.A. 2583, applies to all violations of the Welfare code (which includes day care operations) and imposes a fine of \$500 or 60 days in jail, or both. Interestingly, some prosecutors have been charging welfare fraud cases, under the general criminal statute, with fraud and false pretenses. It is conceivable, depending upon the circumstances of the operation, that an illegal day care operation could be similarly charged, thus producing a greater impact upon the general public and potential violators. The letter closes with a statement that no permission has been given that would allow the day care facility to continue operations without a license.

If, after 10 days from the date of the mailing of the letter to a person operating a day care facility illegally, the agency is not in receipt of an application or other positive action such as a request for the assistance offered in the letter, or a statement saying they have decided to cease operation and will not apply, the situation is presented to the director of the agency for further action. It is now a matter to be considered for criminal prosecution

and is no longer an appropriate matter for the licensing staff. Whatever is done by the agency from this point forward is no longer considered as a positive licensing action. Rather, its aim is suppressing an illegal operation. The use of all information already known or to be gathered about the illegal operation has a single focus -- that of prosecution or suppression. The usual ongoing control system of information and work management used in licensing is set aside and the case control is changed from "Licensing" to "Suppression."

All reports and other file material regarding the illegal operation are removed from the regular licensing file and placed in a special file which is only available to the director. Staff are prohibited by the director from engaging in any further activity with or in regard to this illegal operation. They are prohibited from discussing the facility or giving information as to the agency action taken or now being taken and all inquiries are to be referred to the director.

Prior to referral to the prosecuting attorney, it is necessary to have up-to-date evidence that the illegal operation is continuing to operate. Information must be gathered by the agency in respect to the following: 1) whether the service given meets the exemptions of the law; 2) the names and addresses of children and parents using the service; and, 3) the amount of money paid for these services.

When the information above is reviewed and prosecution is indicated, a letter is sent by the director to the prosecuting attorney for the county in which the violation is occurring. The letter reiterates the statutory authority to license and that the

facility named is in business providing day care services to children and is not operating under an exemption of the law. It assures that the agency has searched its records, and the facility is not licensed. The letter gives particulars about the contact with the illegal operator by phone and by letter, and a copy of the letter and attachment materials sent the operator is enclosed. The letter further states that based upon the list of facts enclosed there is no reason to believe the illegal operator intends to comply with the law. It is requested that an action be brought against the facility under the terms of the statute. The letter indicates the licensing agency's willingness to cooperate in the preparation and prosecution of the case and identifies appropriate witnesses the prosecutor may wish to call. A copy of this letter is sent to the agency's attorney.

Once this letter has been sent, the case is considered out of the hands of the director of the agency and further action by the director will only be taken on advice of the prosecuting attorney or the agency's attorney.

The next phase of the process will largely depend upon the attitude and case load of the prosecuting attorney in the community where the illegal operation is occurring. In order for the licensing agency to be kept informed of the prosecutor's intentions and to show the agency's continuing interest in the case, the agency's attorney contacts the prosecuting attorney on behalf of the director. The agency's attorney determines if the prosecutor will move the case and if so, what cooperation is requested by the prosecuting attorney from the agency. It is during these communications that a strategy

is developed toward successful prosecution. This may include the desirability of a civil injunction or other moves by the director, including referring specific circumstances of the illegal operation to protective service agencies or others to protect the children in care and to strengthen the case for suppression.

If the prosecuting attorney, because of work load or attitude about bringing day care operators to court on criminal charges, is ~~unable to cooperate, the agency may request, where legally authorized,~~ that the prosecuting attorney appoint a special prosecutor at the expense of the licensing agency. The agency may, as an alternative, request the attorney general to intercede in the case. If no resolution to the problem of prosecuting the case is reached within 20 days of the letter to the prosecuting attorney, it becomes necessary to pursue the matter civilly rather than criminally.

At this point, a note about agency public relations should be made. Licensing is an awesome responsibility and to some it is regarded as too restrictive and punitive. It is our position, however, that the director of a child day care licensing agency should not wait until he has a potential violator before he makes contact with the appropriate prosecuting attorney. Informal visits should be made with all chief prosecutors who may be involved in prosecutions of illegal operations. The purpose of the visits is to advise as to the licensing agency's role in safeguarding day care and make some determinations with respect to the prosecutor's attitude toward agency goals. The personal contact may serve to aid the agency's cause in the future; it may convince the prosecutor that the agency

is sincere about its goals. This determination may make the difference between having to work with a cooperative or antagonistic prosecutor.

The matter of the use of the civil injunction versus proceeding criminally in the suppression of illegal operations needs to be noted. There are differences of opinion. This is our opinion at this time: while the civil injunction to close the illegally operating facility is a viable alternative procedure available to the agency, the suppression of illegal operations by civil injunction is less intense in tone and lacks the instructional value to the illegal operator and community inherent in a criminal proceeding. In the civil proceeding the court confrontation appears to be between two persons, the director of the agency versus the illegal operator. In the criminal proceeding it appears to be the State versus the illegal operator. The criminal procedure ends in a verdict and a prescribed appropriate penalty, usually a fine and/or imprisonment. Aside from imposing a penalty, this disposition of the case demonstrates that the State has affirmed the licensing law. A civil injunction, on the other hand, may only show that the court believes that poor or dangerous child care did occur and should not be allowed to continue. It does have one advantage, however! The civil suit may result in a court-sanctioned agreement to cease operations. Such agreement is useful in subsequent proceedings should they arise and reduces the amount of proof necessary for additional action.

Since the atmosphere of a criminal or civil trial may be considerably more intense and demanding than a fair hearing, the licensing

agency must prepare the staff for the experience. The staff should receive training in the proceedings of a trial and the role they may be required to play. This training and the general knowledge of the proceedings will greatly relieve the anxieties of the workers and help give a basic security in their court appearance. No worker should ever be presented as a witness for the State or the licensing agency without preparation. If possible, the licensing agency's staff in-service training should include the witnessing of a trial.

In order for the prosecuting attorney in a criminal trial, or the agency's attorney in a civil trial, to make the best use of a staff witness, the attorney should be advised of the worker's competence, experience, and education. This intelligence is best accomplished by presenting the attorney with a written resume for each prospective staff witness from the licensing agency. The resume should include the staff person's name, official position title, length of employment in the agency, description of present position and any former positions, other related employment, and education.

The agency's court experiences in the suppression of illegal operations may include appeals to higher courts and decisions unfavorable to the agency. Regardless of the outcome of specific trials, the instructional value of the agency's initiative and performance in court will have a positive effect on the agency's image and respect in the community. The transcripts of trials, both won and lost, will also be of considerable in-service training value.

APPENDIX IV.

The Model State Administration Procedure Act, with an Introductory Note by Rudolf H. Michaels, Administrative Law Judge, California Office of Administrative Hearings.

Introductory Note

It is generally recognized today that proceedings which affect a constitutionally guaranteed right, such as a license to conduct a day care center, must follow a procedure which satisfies the due process clause of the 14th Amendment and must abstain from employing methods which "offend our traditional notions of fair play and substantial justice," as Chief Justice Stone said in 1945 in International Shoe Company v. Washington. (326 US 310).

Thus, the entire quasi-judicial aspect of the proceedings, beginning with a clear and informative notice and statement of the charges and ending in a realistic process for review of the "final" agency decision in the courts, must be fair to the holder and impartial to all concerned. But this is not enough.

The quasi-legislative process must also comply with our traditional notions because revocation proceedings and denials are inherently based on a failure by the licensee or applicant to meet the standards governing the licensed activity. If these standards are contained in a statute, there is no particular due process problem. But if the standards also include agency "policies" which may not be known or readily available to the public, or formal regulations adopted by the agency in its quasi-legislative capacity, it is also

necessary to provide a process which protects the licensee against loss of the license for violations of a "policy" which was either not articulated, inaccessible, or adopted in a manner which prevented him or other interested parties from participating in and challenging the regulatory scheme during or following its adoption.

This communication is particularly important because regulations reasonably and properly adopted, usually have the force of law by virtue of a statutory incorporation by reference.

Today more than half of the jurisdictions in the United States have some kind of a statutory scheme which governs both the publication and adoption of administrative regulations and the initiation and conduct of administrative adjudicatory proceedings, but this has not always been true. Well into the 1940's, agency "policies" were often formulated on an ad hoc basis, were likely to be preserved in form of a carbon copy of a letter in someone's file drawer, and were, in effect, practically unchallengeable. The process of granting, renewing, suspending, and revoking licenses of all kinds was often highly arbitrary and relief in the courts was available in theory but frequently not in practice.

With the great increase in regulatory activity during the years following the depression, the impact of these injustices and difficulties was more and more widely and strongly felt. With this recognition came the realization that something had to be done to solve the problem.

In 1937, the American Bar Association created a Committee on Administrative Agencies and Tribunals and became and remained involved

in the steps which, in 1946, led to the enactment by the Congress of the Federal Administrative Procedure Act. During the same period, a "model" act was developed by the National Conference of Commissioners on Uniform State Laws, was first approved in 1946 shortly after the federal act became law, and was most recently revised in 1958 and republished in 1961.

The "Model State Administrative Procedure Act," set out in full in this Appendix, was promulgated with the endorsement of the American Bar Association which joined the National Conference of Commissioners in urging all states to enact this or similar legislation.

As of 1976, at least twenty-seven jurisdictions have adopted the model act or something very close to it,* and eight other states had thorough statutory plans covering the subject without apparent reliance on the model act** and adopted in the years shown in parentheses in the footnote.

* (See next page)

** (See next page)

* (From page 120)

MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Law	Effective Date	Statutory Citation
Arkansas	1967, No. 434	3-17-1971	Ark. Stat. §§ 3-701 to 3-714.
Connecticut	1971, P.A. 854	1-1-1972	C.S.S.A. §§ 4-166 to 4-189.
District of Columbia	1968, Pub.L. 90-614	10-21-1968	D.C.C.E. §§ 1-1501 to 1-1510.
Georgia	1964, p. 378	3-1-1965	Code, §§ 34-101 to 34-124.
Illinois	1961, c. 123		HRS §§ 91-1 to 91-18.
Iowa	1968, c. 273	1-1-1968	I.C. §§ 67-3251 to 67-3210.
Kansas	1973, P.A. 79-1087	9-27-1973	S.M.A. ch. 127, §§ 1021 to 1021.
Kentucky	1974, c. 1948	7-1-1975	I.C.A. §§ 17A.1 to 17A.25.
Louisiana	1966, No. 382	7-1-1967	LSA-R.S. 49:931 to 49:967.
Maryland	1957, c. 44	6-1-1957	Case 1757, art. 41, §§ 44 to 236A.
Michigan	1969, No. 306	7-1-1970	M.C.L.A. §§ 24.201 to 24.313.
Minnesota	1945, p. 1504		V.A.R.S. §§ 134.010 to 134.150.
Mississippi	1971, c. 2	12-31-1972	R.C. 7:1947, §§ 82-8202 to 82-8225.
Montana	1949, c. 253		R.S. 1949, §§ 84-901 to 84-919.
Nebraska	1965, c. 941		R.S. 2130.010 to 2130.100.
New Hampshire	1973, c. 307	8-21-1973	RSA 941-A.1 to 941-A.9.
New York	1973, c. 167	6-1-1974	McClary's, State Administrative Procedure Act § 100 et seq.
North Carolina	1973, c. 1331	3-1-1975	G.S. §§ 152A-1 to 152A-49.
Oklahoma	1967, c. 371		79 Okl.Stat. §§ 361 to 377.
Rhode Island	1962, c. 112	1-1-1964	Gen. Laws 1964, §§ 42-35-1 to 42-35-18.
South Carolina	1966, c. 129		§ 21.1-1-1 to 1-18-00.
Tennessee	1978, c. 723	7-1-1979	T.C.A. §§ 4-272 to 4-277.
Vermont	1967, Act 367	7-1-1969	1 V.S.A. §§ 911 to 914.
Washington	1954, c. 234		R.C.W.A. 34.60.010 to 34.61.045.
West Virginia	1964, c. 1	7-1-1964	Code, 24A-1 to 24A-74.
Wisconsin	1953, c. 221		R.S.A. 227.01 to 227.26.
Wyoming	1965, c. 123	1-1-1966	W.S. 2737, §§ 4-274.15 to 4-274.31.

** (From page 120) North Dakota (1941); Ohio (1945); Virginia (1944, revised 1975); California (1945); Pennsylvania (1945); Indiana (1947); Massachusetts (1954); Florida (1974).

The act was developed as a model because the Commissioners did not think that complete nationwide uniformity was required but that it was necessary to provide a guide, thoughtfully put together and covering all aspects of the problem, in a manner consistent with current due process requirements.

The similarities between the provisions of the model act and the statutes developed in the jurisdictions which did not choose to follow the model step by step are great, but there is also substantial differences.

For example, the model act appears to proceed on the premise that the "agency itself," whether commission, board, or individual, will hear the contested cases, whereas the trend in modern times has been to appoint adjudicatory officers to conduct the formal hearings. Some of the state laws make no express provision for such appointments; in some, these officers are appointed from within the agency or are on its permanent staff, and in others, such as California, there is a corps of independent Administrative Law Judges who hear licensing and similar cases and make recommendations in the form of "proposed decisions" to the regulatory agency.

The rules of evidence also vary widely from the strict and formal rule found in Section 10 of the model act, ranging from the modern and highly workable California version found in the footnote to Section 10, to amorphous statements indicating that the proceedings need not or shall not be conducted under the formal rules of evidence.

The provisions for judicial review also vary widely from state to state, and here, too, for contrast and as an example, the California

statute has been included as a footnote to Section 15 of the model act.

In summary: twenty-seven jurisdictions have statutes closely following the principles and the minimum safeguards contained in the model act and eight states have parallel statutes. But even where there is no express statute governing the subject, the model act may well serve as a statement of the steps a state or local agency would be well advised to follow if it wishes to succeed in the courts against a charge that its procedures have deprived an applicant or a licensee of due process of law.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT*

AN ACT Concerning Procedure of State Administrative Agencies
and Review of Their Determinations.

[Be it enacted, ...]

1 SECTION 1. [Definitions.] As used in this Act:

2 (1) "agency" means each state [board, commission, de-
3 partment, or officer], other than the legislature or the courts,
4 authorized by law to make rules or to determine contested
5 cases;

6 (2) "contested case" means a proceeding, including but
7 not restricted to ratemaking, [price fixing], and licensing,
8 in which the legal rights, duties, or privileges of a party
9 are required by law to be determined by an agency after
10 an opportunity for hearing;

11 (3) "license" includes the whole or part of any agency
12 permit, certificate, approval, registration, charter, or similar
13 form of permission required by law, but it does not include
14 a license required solely for revenue purposes;

15 (4) "licensing" includes the agency process respecting
16 the grant, denial, renewal, revocation, suspension, annul-
17 ment, withdrawal, or amendment of a license;

18 (5) "party" means each person or agency named or ad-
19 mitted as a party, or properly seeking and entitled as of
20 right to be admitted as a party;

21 (6) "person" means any individual, partnership, corpora-

tion, association, governmental subdivision, or public or private organization of any character other than an agency;
(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

SECTION 2. *[Public Information; Adoption of Rules; Availability of Rules and Orders.]*

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

SECTION 3. *[Procedure for Adoption of Rules.]*

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting state];

14 (2) afford all interested persons reasonable opportu-
15 nity to submit data, views, or arguments, orally or in
16 writing. In case of substantive rules, opportunity for oral
17 hearing must be granted if requested by 25 persons, by a
18 governmental subdivision or agency, or by an association
19 having not less than 25 members. The agency shall con-
20 sider fully all written and oral submissions respecting the
21 proposed rule. Upon adoption of a rule, the agency, if
22 requested to do so by an interested person either prior to
23 adoption or within 30 days thereafter, shall issue a concise
24 statement of the principal reasons for and against its
25 adoption, incorporating therein its reasons for overruling
26 the considerations urged against its adoption.

27 (b) If an agency finds that an imminent peril to the
28 public health, safety, or welfare requires adoption of a
29 rule upon fewer than 20 days' notice and states in writing
30 its reasons for that finding, it may proceed without prior
31 notice or hearing or upon any abbreviated notice and hear-

1 SECTION 4: *[Filing and Taking Effect of Rules.]*

2 (a) Each agency shall file in the office of the [Secretary
3 of State] a certified copy of each rule adopted by it, includ-
4 ing all rules existing on the effective date of this Act. The
5 [Secretary of State] shall keep a permanent register of the
6 rules open to public inspection.

7 (b) Each rule hereafter adopted is effective 20 days after
8 filing, except that:

9 (1) if a later date is required by statute or specified in
10 the rule, the later date is the effective date;

11 (2) subject to applicable constitutional or statutory
12 provisions, an emergency rule becomes effective immedi-
13 ately upon filing with the [Secretary of State], or at a
14 stated date less than 20 days thereafter, if the agency finds
15 that this effective date is necessary because of imminent
16 peril to the public health, safety, or welfare. The agency's
17 finding and a brief statement of the reasons therefor shall
18 be filed with the rule. The agency shall take appropriate
19 measures to make emergency rules known to the persons
20 who may be affected by them.

1 SECTION 5: *[Publication of Rules.]*

2 (a) The [Secretary of State] shall compile, index, and
3 publish all effective rules adopted by each agency. Com-
4 pilations shall be supplemented or revised as often as neces-
5 sary (and at least once every 2 years).

6 (b) The [Secretary of State] shall publish a [monthly]
7 bulletin setting forth the text of all rules filed during the
8 preceding [month] excluding rules in effect upon the adop-
9 tion of this Act.

10 (c) The [Secretary of State] may omit from the bulletin
11 or compilation any rule the publication of which would be
12 unduly cumbersome, expensive, or otherwise inexpedient,
13 if the rule in printed or processed form is made available
14 on application to the adopting agency, and if the bulletin or
15 compilation contains a notice stating the general subject
16 matter of the omitted rule and stating how a copy thereof
17 may be obtained.

18 (d) Bulletins and compilations shall be made available
19 upon request to [agencies and officials of this State] free
20 of charge and to other persons at prices fixed by the [Secre-
21 tary of State] to cover mailing and publication costs.

1 SECTION 6. [*Petition for Adoption of Rules.*] An in-
2 terested person may petition an agency requesting the
3 promulgation, amendment, or repeal of a rule. Each agency
4 shall prescribe by rule the form for petitions and the pro-
5 cedure for their submission, consideration, and disposition.
6 Within 30 days after submission of a petition, the agency
7 either shall deny the petition in writing (stating its reasons
8 for the denials) or shall initiate rule-making proceedings in
9 accordance with Section 3.

1 SECTION 7. [*Declaratory Judgment on Validity or Appli-*
2 *cability of Rules.*] The validity or applicability of a rule
3 may be determined in an action for declaratory judgment
4 in the [District Court of . . . County], if it is alleged that
5 the rule, or its threatened application, interferes with or
6 impairs, or threatens to interfere with or impair, the legal
7 rights or privileges of the plaintiff. The agency shall be
8 made a party to the action. A declaratory judgment may be
9 rendered whether or not the plaintiff has requested the
10 agency to pass upon the validity or applicability of the rule
11 in question.

1 SECTION 8. [*Declaratory Rulings by Agencies.*] Each
2 agency shall provide by rule for the filing and prompt dis-
3 position of petitions for declaratory rulings as to the appli-
4 cability of any statutory provision or of any rule or order
5 of the agency. Rulings disposing of petitions have the same
6 status as agency decisions or orders in contested cases.

1 SECTION 9. [*Contested Cases; Notice; Hearing; Record*]

2 (a) In a contested case, all parties shall be afforded a
3 opportunity for hearing after reasonable notice.

4 (b) The notice shall include:

5 (1) a statement of the time, place, and nature of the
6 hearing;

7 (2) a statement of the legal authority and jurisdiction
8 under which the hearing is to be held;

9 (3) a reference to the particular sections of the statutes
10 and rules involved;

11 (4) a short and plain statement of the matters asserted.
12 If the agency or other party is unable to state the matters
13 in detail at the time the notice is served, the initial notice
14 may be limited to a statement of the issues involved.

15 Thereafter upon application a more definite and detailed
16 statement shall be furnished.

17 (c) Opportunity shall be afforded all parties to respond
18 and present evidence and argument on all issues involved.

19 (d) Unless precluded by law, informal disposition may
20 be made of any contested case by stipulation, agreed settle-
21 ment, consent order, or default.

22 (e) The record in a contested case shall include:

23 (1) all pleadings, motions, intermediate rulings;

24 (2) evidence received or considered;

25 (3) a statement of matters officially noticed;

26 (4) questions and offers of proof, objections, and rul-
27 ings thereon;

28 (5) proposed findings and exceptions;

29 (6) any decision, opinion, or report by the officer
30 presiding at the hearing;

31 (7) all staff memoranda or data submitted to the
32 hearing officer or members of the agency in connection
33 with their consideration of the case.

34 (f) Oral proceedings or any part thereof shall be tran-
35 scribed on request of any party.

36 (g) Findings of fact shall be based exclusively on the
37 evidence and on matters officially noticed.

1 SECTION 10. [*Rules of Evidence; Official Notice.*] In con-
2 tested cases:

3 (1) irrelevant, immaterial, or unduly repetitious evidence
4 shall be excluded. The rules of evidence as applied in
5 [non-jury] civil cases in the [District Courts of this State]
6 shall be followed. When necessary to ascertain facts not
7 reasonably susceptible of proof under those rules, evidence
8 not admissible thereunder may be admitted (except where
9 precluded by statute) if it is of a type commonly relied
10 upon by reasonably prudent men in the conduct of their
11 affairs. Agencies shall give effect to the rules of privilege
12 recognized by law. Objections to evidentiary offers may be
13 made and shall be noted in the record. Subject to these
14 requirements, when a hearing will be expedited and the
15 interests of the parties will not be prejudiced substantially,
16 any part of the evidence may be received in written form;

17 [(2) documentary evidence may be received in the form
18 of copies or excerpts, if the original is not readily available.
19 Upon request, parties shall be given an opportunity to
20 compare the copy with the original;]

21 (3) a party may conduct cross-examinations required for
22 a full and true disclosure of the facts;

23 (4) notice may be taken of judicially cognizable facts.
24 In addition, notice may be taken of generally recognized
25 technical or scientific facts within the agency's specialized
26 knowledge. Parties shall be notified either before or during
27 the hearing, or by reference in preliminary reports or other-
28 wise, of the material noticed, including any staff memoranda
29 or data, and they shall be afforded an opportunity to contest
30 the material so noticed. The agency's experience, technical
31 competence, and specialized knowledge may be utilized in
32 the evaluation of the evidence. 3/

3/ California Government Code

Evidence by Rules

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses;
to introduce exhibits; to cross-examine opposing witnesses on any mat-
ter relevant to the issues even though that matter was not covered in
the direct examination; to impeach any witness regardless of which
party first called him to testify; and to rebut the evidence against him.

If respondent does not testify in his own behalf he may be called and
examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules
relating to evidence and witnesses. Any relevant evidence shall be ad-
mitted if it is the sort of evidence on which responsible persons are ac-
customed to rely in the conduct of serious affairs, regardless of the
existence of any common law or statutory rule which might make im-
proper the admission of such evidence over objection in civil actions.
Hearsay evidence may be used for the purpose of supplementing or ex-
plaining other evidence but shall not be sufficient in itself to support a
finding unless it would be admissible over objection in civil actions. The
rules of privilege shall be effective to the extent that they are otherwise
required by statute to be recognized at the hearing, and irrelevant and
unduly repetitious evidence shall be excluded.

(d) The hearing shall be conducted in the English language. The
proponent of any testimony to be offered by a witness who does not
proficiently speak the English language shall provide an interpreter,
approved by the hearing officer conducting the proceeding as proficient
in the English language and the language in which the witness will
testify, to serve as interpreter during the hearing. The cost of the
interpreter shall be paid by the agency having jurisdiction over the
matter if the hearing officer so directs, otherwise by the party provid-
ing the interpreter. The Office of Administrative Hearings may compile
and publish a list of interpreters known to be proficient in various
languages. Any person whose name appears upon such a list shall be
deemed to be approved by the hearing officer hearing the case.

1 SECTION 11. [*Examination of Evidence by Agency.*]
2 When in a contested case a majority of the officials of the
3 agency who are to render the final decision have not heard
4 the case or read the record, the decision, if adverse to a
5 party to the proceeding other than the agency itself, shall
6 not be made until a proposal for decision is served upon
7 the parties, and an opportunity is afforded to each party
8 adversely affected to file exceptions and present briefs and
9 oral argument to the officials who are to render the deci-
10 sion. The proposal for decision shall contain a statement of
11 the reasons therefor and of each issue of fact or law neces-
12 sary to the proposed decision, prepared by the person who
13 conducted the hearing or one who has read the record. The
14 parties by written stipulation may waive compliance with
15 this section.

1 SECTION 12. [*Decisions and Orders.*] A final decision or
2 order adverse to a party in a contested case shall be in
3 writing or stated in the record. A final decision shall include
4 findings of fact and conclusions of law, separately stated.
5 Findings of fact, if set forth in statutory language, shall be
6 accompanied by a concise and explicit statement of the
7 underlying facts supporting the findings. If, in accordance
8 with agency rules, a party submitted proposed findings of
9 fact, the decision shall include a ruling upon each proposed
10 finding. Parties shall be notified either personally or by
11 mail of any decision or order. Upon request a copy of the
12 decision or order shall be delivered or mailed forthwith to
13 each party and to his attorney of record.

1 SECTION 13. [*Ex Parte Consultations.*] Unless required
2 for the disposition of *ex parte* matters authorized by law,
3 members or employees of an agency assigned to render a
4 decision or to make findings of fact and conclusions of law
5 in a contested case shall not communicate, directly or in-
6 directly, in connection with any issue of fact, with any
7 person or party, nor, in connection with any issue of law,
8 with any party or his representative, except upon notice and
9 opportunity for all parties to participate. An agency member
10 (1) may communicate with other members of the
11 agency, and
12 (2) may have the aid and advice of one or more per-
13 sonal assistants.

1 SECTION 14. [Licenses.]

2 (a) When the grant, denial, or renewal of a license is
3 required to be preceded by notice and opportunity for hear-
4 ing, the provisions of this Act concerning contested cases
5 apply.

6 (b) When a licensee has made timely and sufficient
7 application for the renewal of a license or a new license with
8 reference to any activity of a continuing nature, the existing
9 license does not expire until the application has been finally
10 determined by the agency, and, in case the application is
11 denied or the terms of the new license limited, until the
12 last day for seeking review of the agency order or a later
13 date fixed by order of the reviewing court.

14 (c) No revocation, suspension, annulment, or with-
15 drawal of any license is lawful unless, prior to the institution
16 of agency proceedings, the agency gave notice by mail to
17 the licensee of facts or conduct which warrant the intended
18 action, and the licensee was given an opportunity to show
19 compliance with all lawful requirements for the retention
20 of the license. If the agency finds that public health, safety,
21 or welfare imperatively requires emergency action, and in-
22 corporates a finding to that effect in its order, summary
23 suspension of a license may be ordered pending proceedings
24 for revocation or other action. These proceedings shall be
25 promptly instituted and determined.

1 SECTION 15. [Judicial Review of Contested Cases.]

2 (a) A person who has exhausted all administrative reme-
3 dies available within the agency and who is aggrieved by
4 a final decision in a contested case is entitled to judicial
5 review under this Act. This Section does not limit utilization
6 of or the scope of judicial review available under other
7 means of review, redress, relief, or trial *de novo* provided
8 by law. A preliminary, procedural, or intermediate agency
9 action or ruling is immediately reviewable if review of the
10 final agency decision would not provide an adequate remedy.

11 (b) Proceedings for review are instituted by filing a
12 petition in the [District Court of the _____
13 County] within [30] days after [mailing notice of] the final
14 decision of the agency or, if a rehearing is requested,
15 within [30] days after the decision thereon. Copies of the
16 petition shall be served upon the agency and all parties of
17 record.

18 (c) The filing of the petition does not itself stay en-
19 forcement of the agency decision. The agency may grant,
20 or the reviewing court may order, a stay upon appropriate
21 terms.

22 (d) Within [30] days after the service of the petition,
23 or within further time allowed by the court, the agency
24 shall transmit to the reviewing court the original or a
25 certified copy of the entire record of the proceeding under

26 review. By stipulation of all parties to the review proceed-
27 ings, the record may be shored. A party unreasonably
28 refusing to stipulate to limit the record may be taxed by
29 the court for the additional costs. The court may require or
30 permit subsequent corrections or additions to the record.

31 (e) If, before the date set for hearing, application is made
32 to the court for leave to present additional evidence, and
33 it is shown to the satisfaction of the court that the additional
34 evidence is material and that there were good reasons for
35 failure to present it in the proceeding before the agency,
36 the court may order that the additional evidence be taken
37 before the agency upon conditions determined by the court.
38 The agency may modify its findings and decision by reason
39 of the additional evidence and shall file that evidence and
40 any modifications, new findings, or decisions with the re-
41 viewing court.

42 (f) The review shall be conducted by the court without
43 a jury and shall be confined to the record. In cases of alleged
44 irregularities in procedure before the agency, not shown
45 in the record, proof thereon may be taken in the court. The
46 court, upon request, shall hear oral argument and receive
47 written briefs.

48 (g) The court shall not substitute its judgment for that
49 of the agency as to the weight of the evidence on questions
50 of fact. The court may affirm the decision of the agency or
51 remand the case for further proceedings. The court may
52 reverse or modify the decision if substantial rights of the
53 appellant have been prejudiced because the administrative
54 findings, inferences, conclusions, or decisions are:

- 55 (1) in violation of constitutional or statutory pro-
56 visions;
- 57 (2) in excess of the statutory authority of the agency;
- 58 (3) made upon unlawful procedure;
- 59 (4) affected by other error of law;
- 60 (5) clearly erroneous in view of the reliable, proba-
61 tive, and substantial evidence on the whole record; or
- 62 (6) arbitrary or capricious or characterized by abuse
63 of discretion or clearly unwarranted exercise of discretion.

4/

4/ Judicial Review: California Government Code

11523. Judicial review may be had by filing a petition for a writ of
mandate in accordance with the provisions of the Code of Civil Procedure,
subject, however, to the statutes relating to the particular agency. Except
as otherwise provided in this section any such petition shall be filed within
30 days after the last day on which reconsideration can be ordered. The
right to petition shall not be affected by the failure to seek reconsideration
before the agency. The complete record of the proceedings, or such parts
thereof as are designated by the petitioner, shall be prepared by the
agency and shall be delivered to petitioner, within 30 days after a request
therefor by him, upon the payment of the fee specified in Section 6999:
of the Government Code as now or hereinafter amended for the trans-
script, the cost of preparation of other portions of the record and for
certification thereof. The complete record includes the pleadings, writ-
tices and orders issued by the agency, any proposed decision by a hearing
officer, the final decision, a transcript of all proceedings, the exhibits
admitted or rejected, the written evidence and any other papers in the
case. Where petitioner, within 10 days after the last day on which reconsid-
eration can be ordered, requests the agency to prepare all or any part of
the record the time within which a petition may be filed shall be extended
until 30 days after its delivery to him. The agency may file with the court

4/ cont'd

California Code of Civil Procedure

1094.5. Review of administrative orders or decisions; filing record; extent of inquiry; abuse of discretion; relevant evidence; judgment; stay

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, by the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 403) of Part 2 or Chapter 3 (commencing with Section 1010) of Title 14 of Part 2. If an

1 [SECTION 16. *[Appeals.]* An aggrieved party may obtain
2 a review of any final judgment of the [District Court]
3 under this Act by appeal to the [Supreme Court]. The
4 appeal shall be taken as in other civil cases.]

1 [SECTION 17. *[Severability.]* If any provision of this Act
2 or the application thereof to any person or circumstance is
3 held invalid, the invalidity does not affect other provisions
4 or applications of the Act which can be given effect without
5 the invalid provision or application, and for this purpose
6 the provisions of this Act are severable.]

1 SECTION 18. *[Repeal.]* The following acts and parts of
2 acts are repealed:

- 3 (1) ;
4 (2) ;
5 (3) ..

1 SECTION 19. *[Time of Taking Effect and Scope of Appli-*
2 *cation.]* This Act takes effect and (except
3 as to proceedings then pending) applies to all agencies and
4 agency proceedings not expressly exempted.

4/ cont'd

appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

(Added by Stats. 1943, Chap. 568, Sec. 1; amended by Stats. 1949, Chap. 338, Sec. 1; amended by Stats. 1974, Chap. 668, Sec. 1.)

SUMMARY (Note: In any formal presentation of the text and appendices, this summary should not be included.)

Title: A Conceptual Statement on the Enforcement of Child Day Care Licensing Standards

I. Prefatory Comment.

A new pattern of child rearing, especially for the preschool child, emerged in mid twentieth century America. This new cultural pattern of child rearing might best be described as "multiple parenting". Child day care is a statistically important manifestation of multiple parenting.

To date, child day care licensing is the primary legal regulation which has developed in order to safeguard this new form of child rearing. The licensing development has not always been well planned. More importantly, observation leads to the conclusion that there has been a faulty, and general lack of, enforcement of child day care licensing standards. Many factors may account for this faulty enforcement. The authors of this Statement believe a critical determinant is a lack of conceptual clarity of the enforcement process, especially revocation of the license. The most important pragmatic value of conceptual analysis is that it provides a sense (often a fresh sense) of operational direction.

II. The functional nature of licensing.

The basic function of child day care licensing is to reduce risks in facilities' providing for part of the day a supplementary parent service to children. In essence, it is a preventive (not treatment) service. It is similar to the public health model of

prevention in which there is manipulation of the environment to lessen vulnerability to certain hazards of care. The risks or hazards reduction is achieved by requiring certain standards be met -- generally in advance -- before official approval to operate is granted. The signing of the application gives permission to the state to conduct a regulatory investigation -- in a sense, to invade the property or privacy of the applicant. The purpose of the regulatory investigation is to determine standards compliance. The overall function of enforcement is to assure that compliance with licensing standards exists wherever jurisdictionally covered child day care operations take place.

III. Types of enforcement operations.

Enforcement needs to be recognized as a triad of administrative activities: 1) positive enforcement of standards in the form of supervisory visits (after a license has been issued) to assure continued compliance, and possibly to avoid later litigation in the form of revocation; 2) negative enforcement of standards in the form of denial, nonrenewal, or revocation of the license when regulatory investigation has determined noncompliance with standards; and 3) suppression of illegal operations (generally operation without a license) in which the legal point of reference is with much frequency the criminal law rather than the civil law. All three administrative enforcement operations have the same goal as indicated above, namely, that whenever day care takes place there be compliance with standards.

Specific sections of limited length dealt with operating policies and practices as they relate to supervisory visits, denial and non-renewal. Revocation is dealt with at greater length. At the present time, revocation is the par excellent operational challenge in the enforcement of child day care standards. In the revocation situation and the possibly attending administrative hearing, there is truly a working through, a community resolution, of how far the state may go in the safeguarding of children in facilities once the latter have been officially approved by license. The suppression of illegal operations was generally not dealt with in the text but appendix material (III) contains an account of how one state approaches it. The reason for not dealing with suppression in this Statement was that in these situations the persons giving the day care service have not submitted to the jurisdiction of the licensing law. Not always, but generally, the legal point of reference is the criminal law. The issue is therefore a matter of criminal law rather than regulatory enforcement.

IV. Some major policy issues in enforcement.

In dealing with each major enforcement topic; 1) supervision, 2) denial, 3) nonrenewal and 4) revocation, an effort was made to point up and make enumerative comment on significant policy and practice issues. The latter will not generally be re-enumerated here. Rather, we believe these seven propositional statements catch up and express in brief major policy issues relative to improving and strengthening enforcement of state child day care licensing standards:

A. Administrative location of child day care licensing.

The administrative location of the child day care licensing agency may be a critical determinant in generating the necessary constituency support essential to sound enforcement operations. At present, over 80 percent of the time, day care licensing is one of the responsibilities of a state welfare department whose functions pertain primarily to public assistance or relief giving, and to grave problems of dependency, disability, or even delinquency. These functions generate a departmental image not conducive to the development of program leadership in a field such as day care. Among the adult consumers of child day care services there are, to be sure, some persons who are economically disadvantaged, dependent, or disabled, but day care per se is certainly not a "social pathology" treatment program.

B. Centralized vs. decentralized administration.

The achievement of equal treatment and uniform practices, so essential to sound licensing administration, would seem to be hindered by faulty thinking in respect to decentralized welfare organization and the advocacy of regional operations and decision-making. Possibly a case can be made for decentralization of assistance and case treatment programs. Licensing, however, is neither of these. It is a preventive activity, premised upon state intervention to reduce risks in out-of-home care. Centralized institutional decision-making is crucial to sound regulatory administration. Organization theoreticians and analysts have failed to appreciate the unique features of licensing administration.

C. Provisional licensure and renewal of license.

The presence of poorly statutory sections relating to "provisional" licensure and renewal of licenses would seem to have an adverse effect on sound enforcement administration. Presently, one of the net effects of provisional licensure is to contribute to inequitable treatment and uneven operational practices. In some instances it spawns a "second class" type of facility. Renewal operations are frequently confused because the legal standing of the applicant is not clear, and guidelines as to the nature of the regulatory investigation to be conducted are generally absent in the statute.

D. Feasible alternatives to revocation.

The availability of measures short of revocation presses for consideration. The present enforcement situation in many localities is a dichotomous matter of non-use of negative sanction or of "sudden death" (revocation). The statutes may provide suspension of the license but in the minds of some this remedy is of questionable utility in child care regulatory administration. (A better case, however, may perhaps be made for the use of suspension of license in day care than in twenty four hour care.) Probation may also be possible either explicitly or implicitly, but the formal use of probation does not seem to be widespread. The use of probation in a field like child care might well present some legal problems such as "standing" of the licensee, and also economic problems such as certification for payment out of public funds. Although no advocacy was made, it was pointed out that there is need for discussion of these possible negative sanctions: "warnings", "cease and desist orders", and "fines",

some of which are used in other regulatory programs. Of course the potentialities and limitations of the injunction as alternative needs study, especially comparative study.

E. Basis of appeal to courts: de novo vs. on-the-record.

The basis of appeal to the courts following administrative adjudication varying from de novo to "on-the-record" needs further attention. A position of advocacy of an on-the-record basis is taken providing the administrative hearing is characterized by a competent hearing officer and procedures which assure equal protection and fairness. The development of proper administrative acts, competent hearing personnel, and (eventually) efficient administrative procedure agencies is essential if sound enforcement is to take place. Sound administrative adjudication is a key factor in the achievement of sound regulatory enforcement operations.

F. Refinement of personnel administrators relative to enforcement.

If substantial gains are to be made in the enforcement of licensing standards attention must be given to defining vocational roles or staff qualifications in enforcement administration. It is proposed that there be a top management position, an enforcement officer, who would be responsible for policy and practice operations relating to enforcement. Preferably, qualifications for this position would include both legal and social work (or child development) training and experience. Specialized regulatory investigators are needed to carry out certain types of enforcement operations including assignments relating to suppression of illegal operations. The role of the line

licensing supervisor should be formally redefined to include specific tasks relating to enforcement.

G. Role of federal government in state licensing enforcement.

The position has been taken that providing adequate and proper child day care services is primarily an administrative responsibility of state government, to be shared with local government and community groups. Likewise the basic safeguarding of child day care by means of regulatory programs must be seen as a primary responsibility of the state. The role of the federal government in the enforcement of state child day care licensing standards was seen as being a secondary or support service to the state regulatory agency. As a support service the federal government should furnish 1) professional leadership, 2) technical assistance, and 3) incentive grants to refine, strengthen and expand child day care licensing administration generally and licensing standards enforcement specifically. All grants should be based upon an approved state plan jointly formulated by the state and federal government.

V. State day care licensing and FIDCR.

The text of the Statement is concluded with a comment on "Whither FIDCR?" The following is an excerpt from the comment:

. . . FIDCR is not a licensing program. From a classificatory point of view, FIDCR might be regarded as a fiscal regulatory administrative program. Standards are formulated; individual instances of operations are inspected for standards compliance; and, positive or negative sanctions (economic, not legal) are administered. If compliance is not present, payment involving federal funds is not, or should not, be made.

It has been stated that sound practices of regulatory administration have not always been followed in FIDCR. Some persons have wondered about the standards (requirements) formulation process. (Was there proper notice to concerned persons, were there adequate "hearings" in the formulation of the standards?) Next, claims of faulty or inadequate inspection have been made. Lastly, some hold that there was insufficient "negative enforcement" relative to terminating payments when compliance was not present and taking the immediate steps necessary for reimbursement to the federal government. Even assuming the allegations are true, they do not in themselves constitute a basis for saying the FIDCR idea is necessarily wrong or inappropriate. What is said is simply that the regulatory administrative aspects were not properly dealt with. If there is continuance of FIDCR as is or modified, it is most important that the past regulatory administration be recognized as faulty and that in future operations the faultiness not be present. We believe greater conceptual clarity in respect to licensing standards enforcement may contribute--tangentially--to improved enforcement of FIDCR in giving a better sense of operational directions to enforcement operation.

The authors of this Statement question, for whatever the questioning may be worth, whether FIDCR is the best, most appropriate, long-run policy in order to achieve and upgrade national minimal day care standards. However, they do not necessarily question the feasibility of FIDCR as a short-run program if it is premised on sound principles of fiscal regulatory administration.

The authors of this Statement believe, however, that the critical determinant in the successful administration of any FIDCR-type program is the presence of a well developed system of state regulatory agencies for child day care, effectively, efficiently and economically operated. The state regulatory agencies must be well based statutorily, adequately staffed, and administratively committed to formulating enforceable standards. In addition, high-quality, reliable investigative operations and wholesomely vigorous and equitable enforcement must be present. Without all these features, child day care licensing becomes merely a ritual -- a mockery of safeguarding operations.

NOTE TO THE READER:

The interpretations and conclusions expressed in this paper are the author's and are not intended to represent the position or policy of the Department of Health, Education and Welfare.

It is being distributed to solicit comments and criticisms to assure technical soundness, the adequacy of supporting materials, relevance, and general comprehensibility. It is hoped that this paper and its review will contribute to the improvement of the public debate on social policy and the proper Federal role in regulating child day care.

Comments may be addressed to:

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